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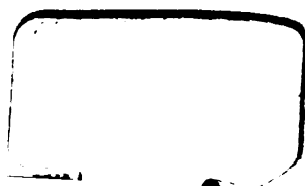
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REPORTS
 OF
 Cases in Law and Equity
 IN THE
 SUPREME COURT
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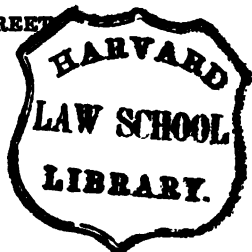
BY OLIVER L. BARBOUR,
 Counsellor at Law.



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JUSTICES OF THE SUPREME COURT,

DURING THE TIME OF THESE REPORTS.

FIRST JUDICIAL DISTRICT.

- CLASS 1. JOHN W. EDMONDS.*¶
2. HENRY P. EDWARDS.†
3. WILLIAM MITCHELL.
4. JAMES G. KING, JUN.‡
JAMES J. ROOSEVELT.§

SECOND JUDICIAL DISTRICT.

1. NATHAN B. MORSE.*†
2. SEWARD BARCULO.
3. JOHN W. BROWN.
4. SELAH B. STRONG.§

THIRD JUDICIAL DISTRICT.

- MALBONE WATSON.*¶
2. AMASA J. PARKER.†
3. WILLIAM B. WRIGHT.
4. IRA HARRIS.

FOURTH JUDICIAL DISTRICT.

1. JOHN WILLARD.*†
2. AUGUSTUS C. HAND.
3. DANIEL CADY.
4. CORNELIUS L. ALLEN.§

FIFTH JUDICIAL DISTRICT.

1. PHILO GRIDLEY.*¶
2. WILLIAM F. ALLEN.
3. FREDERICK W. HUBBARD.
4. DANIEL PRATT.§

JUSTICES OF THE SUPREME COURT.

SIXTH JUDICIAL DISTRICT.

1. CHARLES MASON.*
2. LEVINUS MONSON.
SCHUYLER CRIPPEN.**
3. WILLIAM H. SHANKLAND.
4. HIRAM GRAY.§

SEVENTH JUDICIAL DISTRICT.

1. HENRY WELLES.*¶
2. SAMUEL L. SELDEN.†
3. THOMAS A. JOHNSON.
4. THERON R. STRONG.§

EIGHTH JUDICIAL DISTRICT.

1. SETH E. SILL.††*
MOSES TAGGART;‡‡§†
2. RICHARD P. MARVIN.
3. JAMES G. HOYT.
4. JAMES MULLETT.§

* Presiding Justice in 1851.

† Presiding Justice in 1852.

‡ Appointed by the governor in January, 1851, for the unexpired term of Judge Hurlbut, resigned.

§ Elected in November, 1851.

¶ Judges of the court of appeals during the year 1852.

** Elected in November, 1851, for the unexpired term of Judge Morehouse, deceased.

†† Died September 15, 1851.

‡‡ Appointed by the governor, in October, 1851, for the unexpired term of Judge Sill, deceased.

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ERRATA.

VOL. 10.—Page 91, line 4, strike out "not."

VOL. 11.—Page 481, line 6 from bottom, strike out "afterwards."



CASES
IN
Law and Equity
IN THE
SUPREME COURT
OF THE
STATE OF NEW-YORK.

NEW-YORK GENERAL TERM, March, 1851. *Edmonds, Edwards and Mitchell*, Justices.

McDERMOTT vs. PALMER.

The word "*owner*," as used in the mechanic's-lien-law, is the correlative of *contractor*, and means the person who employs the contractor, and for whom the work is done, under the contract.

On the 22d of October, 1844, W. entered into a contract with P. to do the mason work upon thirteen houses to be erected by P. in the city of New-York. On the 21st of December, 1844, an agreement was made between W. and McC. as parties of the first part, and P. as the party of the second part, in which the agreement between P. and W. and also another agreement between P. and McC. as to the carpenter's work to be done on the said buildings were mentioned by way of recital, and by which it was mutually agreed and declared that the said agreements were thereby made void, and each of the parties released therefrom, &c. The parties of the first part then covenanted that they would purchase the said thirteen houses, &c. and that they would assume the payment of a sum of money then due and payable on a contract for the conveyance of five of the houses and lots, and also of a further sum due on the remaining eight lots, and would also pay to P. the several sums of money which had been advanced to the parties of

McDermott v. Palmer.

the first part upon their respective agreements, and also a further sum of money, being the balance of the purchase money of the said houses and lots; all of which said sums agreed to be paid to P. were to be secured by a mortgage upon the premises, to be executed to P. whenever a deed should be given. The agreement then contained a covenant that the parties of the first part would complete and finish the said thirteen houses according to the terms of the agreements first mentioned, and P. covenanted and agreed to give his notes for the amounts therein mentioned, and by a memorandum attached to the contract, agreed that a deed should be given when the several obligations of the parties should be fulfilled. *Held* that such agreement created the relation of owner and contractor, between P. and W. and McC. within the meaning of the act of April 20, 1830, for the better security of mechanics and others erecting buildings in the city of New-York.

ERROR to the New-York common pleas. The plaintiff in error brought his action under the "Act for the better security of mechanics and others erecting buildings in the city of New-York," passed April 20th, 1830, commonly called the mechanic's-lien-law. He was nonsuited at the trial, mainly on the ground that under and in consequence of a contract entered into on the 21st of December, 1844, between the defendant and Weeks and McCullough, the defendant could not be considered the *owner* of the buildings; at least for the purpose of being charged as such under the lien law. The facts are stated in the opinion of the court.

James B. Sheys, for the plaintiff in error.

David Evans, for the defendant in error.

By the Court, EDWARDS, J. This suit is brought to recover the value of certain work and labor, done and performed by the plaintiff, towards the erection of thirteen houses in the city of New-York, of which it is alledged that the defendant was, at the time, the owner. The plaintiff rests his claim upon the provisions of the "act for the better security of mechanics and others erecting buildings in the city and county of New-York," passed April 20, 1830, as amended April 13, 1832. (2 R. S. 648, 3d ed.)

It was not denied upon the argument that the work and labor was performed by the plaintiff, and that it was of such a char-

McDermott v. Palmer.

acter as would entitle him to a lien under the statute. The only question which was made was, whether, at the time the work was done, the relation of owner and contractor existed as between the defendant and Weeks, who employed the plaintiff.

It appears from the error book, that on the 22d of October, 1844, Weeks entered into a contract with the defendant to do the mason work upon the buildings in question. It further appears that afterwards, and on the 21st of December in the same year, an agreement was entered into between Weeks and McCullough as the parties of the first part, and the defendant as the party of the second part, in which the agreement between the defendant and Weeks, and also another agreement between the defendant and McCullough, as to the carpenter's work to be done on the said buildings, were mentioned by way of recital, and by which it was mutually agreed and declared that the said agreements were thereby made void, and each of the parties released therefrom; but it was also declared that the said agreements should be retained by the parties thereto for reference in regard to the matters specified in the new agreement. The parties of the first part then covenanted that they would purchase the said thirteen houses and the appurtenances, and that they would assume the payment of a sum of money particularly mentioned, which it was stated was then due and payable on a contract for the conveyance of five of the houses and lots, and also of a further sum due on the remaining eight lots, and would also pay to the defendant the several sums of money which had been advanced to the parties of the first part upon their respective agreements, and also a further sum of money, being the balance of the purchase money of the said houses and lots; all of which said sums agreed to be paid to the defendant were to be secured by a mortgage upon the premises to be executed to the defendant, whenever a deed should be given. The agreement then contained a covenant that the parties of the first part would complete and finish the said thirteen houses in all respects according to the terms of the agreement first mentioned, and the specifications thereof; and the defendant covenanted and agreed to give his notes for the amounts therein mentioned, which were to be ad-

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vanced in separate sums to the several parties of the first part, and at different times, in reference to the progress of the work. The agreement contained some other provisions which are unimportant in reference to the question before us, but it contained no covenant on the part of the defendant to convey the premises to the parties of the first part.

There was a memorandum, however, attached to the agreement, which is signed by the defendant, and which has an evident reference to the agreement, which states that it is agreed that a deed of the property shall be given when the several obligations of the parties to the agreement are fulfilled. We think that, although there is no covenant to convey, in the agreement itself, still, that this memorandum when taken in connection with the agreement to which it is attached, and of which it was evidently intended to form a part, would create a binding contract to convey, upon which an action might be sustained, or which might be enforced in equity. (*Coles v. Tricothick*, 9 *Ves. jun.* 250. *Skippey v. Denison*, 5 *Esp.* 190. *Barry v. Coombe*, 1 *Peters*, 640. *Laythoarp v. Bryant*, 2 *Bing. N. C.* 735.)

The question then arises what construction is to be given to the agreement, in reference to the rights of the plaintiff in this suit.

It was proved on the trial that eight of the lots in question had been conveyed to the defendant on the 24th October, 1844. As to the remaining five lots, it does not appear whether he had ever received any conveyance. The agreement, however, shows that he assumed to have the right to make a contract in reference to the buildings to be erected upon them; and to have the right and the power to make a conveyance of them, or to procure one to be made; but he was not bound to execute such conveyance until the buildings were finished according to the contract. The relation then of the defendant to Weeks and McDermott was this: he assumed to have the right to give them a conveyance of all the thirteen lots; he had already entered into two separate agreements with them for doing the mason's and carpenter's work necessary to complete the buildings to be erected upon the lots; these agreements had been cancelled, and a new

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one was entered into which, as regarded the character of the work to be done, embodied the substance of the first two agreements, and stated that such work was to be done in consideration that the defendant would give his notes in the amount and at the times therein mentioned. Here then was a distinct building contract between the defendant who professed to be the owner of the premises, and Weeks, and McCullough who had merely a right to enforce a conveyance of them, after the buildings should be completed. It is true that the moneys to be advanced upon the building contract were to be secured by a mortgage of the premises, when a deed should be given. But they were to be advanced, not as a loan, but as is expressly stated in the agreement, as a consideration for the finishing of the houses according to the contract. If the building contract had stood by itself, there could be no doubt as to the relations between the parties, and certainly their relations can not be changed by incorporating the contract into an agreement for the sale of the premises, to be executed at a future day.

Under these circumstances we think it is manifest that the agreement of the 21st of December created the relation of owner and contractor between the defendant and Weeks and McCullough, within the meaning of the statute. The word *owner*, as used in the statute, is the correlative of *contractor*. It means the person who employs the contractor, and for whom the work is done under the contract.

It is said, however, that the agreement was with Weeks and McCullough jointly, and that Weeks only employed the plaintiff. This is true; but the sums of money to be advanced for the work and labor were to be paid to them separately, and the plaintiff offered to prove that the defendant held money in his hands due to Weeks individually, under the contract.

We think that the nonsuit ought not to have been granted, and that the judgment should be reversed, and a new trial had in the court below.

CHILDS, administratrix, &c. *vs.* BARNUM and others.

11	14
80h	70.

Where a person, by an instrument in writing under seal, expressing a consideration of one dollar to him in hand paid, guaranties the payment of a debt owing by another, the consideration thus expressed is sufficient to satisfy the requirements of the statute of frauds, and to support an action upon the guaranty; notwithstanding the defendants prove on the trial, that the one dollar was not in fact paid.

The seal imports a consideration, and calls on the defendant to rebut that presumption. The burthen of proof, therefore, falls on him, and to sustain his defense, he must prove, not only, that no consideration was *paid*, but that none was *agreed to be paid*. The omission to pay the one dollar does not show a want of consideration, and proof that it was not paid will not entitle the defendant to a verdict.

ERROR to the superior court of the city of New-York. Barnum & Co. sued Russel Childs in the superior court, in covenant, on an agreement signed and sealed by R. Childs, and of which the following is a copy :

“ New-York, May 13, 1845.

In consideration of one dollar, to me in hand paid, I hereby guarantee to Barnum, Morris & McKnight, the payment of one hundred and seventy-eight $7\frac{1}{2}$ dollars in one year from this date, being the balance of William Smith's account, as appears on their ledger.

Witness, Samuel H. Jordan.

R. CHILDS. [L. s.]”

The defendant pleaded non est factum, and gave notice that he would prove that the agreement was executed without any consideration, and that the one dollar was not in fact paid to the defendant. The execution of the instrument was proved, and it was proved that the one dollar was not paid. No proof was offered that it was not *agreed to be paid*. The defendant's counsel insisted that the agreement, being to pay the debt of another was void, unless it expressed the consideration of it; that it expressed the consideration to be one dollar paid to the defendant by the plaintiffs; that the defendant had, pursuant to his notice, proved that the one dollar “ was not paid, and having proved that it was not paid, was entitled to a verdict.” The court decided

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that the plaintiff was entitled to recover, and the defendant excepted. And a judgment being entered against the defendant, he sued out a writ of error.

J. S. Bosworth, for the plaintiff in error.

G. M. Speir, for the defendants in error.

By the Court, MITCHELL, J. The revised statutes (vol. 2, p. 135, § 2) declare that every agreement shall be void unless such agreement, or some note or memorandum thereof expressing the consideration, be in writing, and subscribed by the party to be charged therewith, in the following cases: 1st. An *agreement* that by its terms is not to be performed within a year. 2d. Every special *promise* to answer for the debts, &c. of another. 3d. Every *agreement, promise* or *undertaking*, made in consideration of marriage, except promises to marry. The revisers seem to have made a distinction between agreements and promises, and intentionally to have chosen one word for one class of contracts, and the other for another class. Before the revision, it was held that the agreement to pay the debt of another must express the consideration in writing, as well as the thing to be done; although the statute had not then any such express provision, it being held that the term "agreement" in itself implied a consideration, and that when the statute required the agreement to be in writing, it impliedly required the consideration to be so expressed also. (*Wain v. Warlters*, 5 East, 10.) Yet it was never supposed that the statute applied to such an agreement when under seal, so as to require the consideration to appear on it; the seal of itself imported a consideration and so satisfied the statute, or it may have been deemed that the statute had no reference to sealed instruments. In this respect, so far as the statute against frauds is concerned, this agreement satisfies its requirements, in both respects; it expresses a pecuniary consideration, and the seal also imports a consideration. (*Douglas v. Howland*, 24 Wend. 35. *Bush v. Stevens*, *Id.* 256.) The defendant, however, was at liberty, under the pro-

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visions of the statute, (2 R. S. 406, § 97, § 98, or § 77 and 78,) to rebut the evidence of a sufficient consideration, which is still to be presumed from the seal, on pleading that defense, or giving notice thereof. The law still expressly recognizes the seal as "presumptive evidence of a sufficient consideration," and calls on the defendant to rebut that presumption. The burthen of that proof therefore falls on him. He contends that as the instrument expresses a consideration "of one dollar to him paid," no other can be implied than that sum actually paid, and that when he showed that he had not been paid it, he proved that there was no consideration for his promise. He admits that this rule does not apply to conveyances of land, and that there, although the deed declares the consideration to be money paid, the seller may show it was money not paid but agreed to be paid, and recover the purchase money; and contends that there the deed, on its face, imported a consideration for the purchaser's agreement to pay, namely, the sale of the lands to him; and that even then an agreement of the purchaser to pay must be proved; but that here no agreement of the plaintiffs to pay the one dollar was proved.

The informality of contracts among merchants is such, that great injustice would be done if they were interpreted by the strict rules of grammar; but if the word "paid" be allowed here to contain within itself the double meaning of "paid or to be paid," the difficulty is removed; it then shows on its face that the consideration was paid, or was to be paid. The term "paid," by itself, does not distinctly show whether the sum has been paid or is to be paid; the proper auxiliary must be implied or expressed, before it is known which is the meaning intended. The common "bought and sold notes," are subject to the same ambiguity. "Bought of A. B. by C. D. 100 bales of cotton for \$30 per bale." This seems to imply a sale completed, yet they only mean one to be completed. If the expression were "I will, for one hundred dollars, to me paid, sell to A. B. 100 bushels of wheat," it would be entirely uncertain whether the money had been paid or was to be paid. And although here the guaranty being in the present tense, that uncertainty is not so palpable, it is not en-

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tirely removed ; it is presumptive evidence of actual payment, but not conclusive. So in the case of a deed conveying lands, the words used, similar to these, are presumptive evidence of payment, in an action for the purchase money ; but when it is shown that the money has not been paid, they become presumptive evidence of an *agreement* to pay the amount of the consideration ; although that presumption might be varied by showing an actual contract for a different consideration, or an intention to make a gift. Here, as in a grant of lands, the face of the instrument imports a consideration for the agreement to pay the consideration money ; there it is the sale of the lands, here the guaranty of a debt due by a third person. If the consideration here expressed had been fifty dollars, instead of one dollar, no one reading the instrument would doubt that Barnum & Co. had agreed to pay Childs the \$50 for his guaranty ; though it probably would be supposed that they had not only agreed to pay, but had paid that sum. And it is difficult to see on what principle Childs could have been prevented from recovering that sum if Smith had paid Barnum & Co. within the year, and Childs had proved that he had not been paid his \$50. These short instruments must necessarily be construed according to what they imply, without requiring in them full and exact expressions of all that may be intended. If the face of the instrument shows the meaning of the parties, that is enough. Whether the consideration was \$1 or \$50, or was large or small, it was properly conceded makes no difference in the case. (*Oakley v. Boorman & Johnson*, 21 *Wend.* 588.)

As the instrument proved, satisfied the statute of frauds, that statute might be entirely laid out of view. Then the defendant's right depends on the law opening the proof as to the consideration of sealed instruments ; and as the proof was opened to the defendant to show that there was *no* consideration, it allowed any consideration, whether that named in the instrument or any other, to be shown or implied. And it was incumbent on the defendant to prove the whole negative that he had assumed, viz. that there was no consideration ; he could not limit the plaintiff to a past consideration. But if a consideration of a thing to be

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done was to be inferred from the proof, the defendant failed in sustaining the burthen which the law throws on him. Any law limiting the plaintiff's proof to the consideration expressed, would not apply to such a case. The omission to pay the \$1, did not show a want of consideration. (*See McCartee v. Stevens*, 13 Wend. 527.)

The cases showing that a promise of one person to pay the debt of another, founded only on a past consideration not beneficial to the promisor, nor made at his request, is not binding on him, do not affect this case. There the consideration was not good in law; here the consideration, whether of money paid at the time, or to be paid, is good.

The precise point taken by the defendants below was clearly too narrow. It was that the instrument expressed the one dollar to have been paid, and that it not having been paid, the defendant was entitled to a verdict. This would have excluded the plaintiff from proving an actual and express agreement on his part to pay the dollar. It seems clear that the statute does not confine the promisee to any particular proof of consideration; that it retains the presumption that there is a sufficient consideration, and is new only in allowing the defendant to prove that there was *no* consideration.

The judgment should be affirmed with costs.

[NEW-YORK GENERAL TERM, March 8, 1851. *Edmonds, Edwards and Mitchell*, Justices.]

HANFORD and others vs. ROGERS.

Where two instruments are executed at the same time, between the same parties, and relating to the same subject matter, they are to be construed together, and considered as forming but one contract or agreement.

Accordingly, where, in consideration of \$204, paid by the plaintiffs to the defendant, the latter assigned a bond and mortgage to the former, and covenanted that \$204 and interest was due thereon, and by an indorsement on the bond executed at the same time, guarantied the payment of

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the bond when due; *Held* that the assignment and the guaranty were to be regarded as one instrument, and that the plaintiffs could recover upon the guaranty, although it was not under seal, and no consideration was expressed in it.

THIS cause was tried at the New-York circuit. On 1st Feb. 1838, one Hastings executed his bond to the defendant in the penalty of \$584, conditioned for the payment to the defendant, or his assigns, of the sum of \$292, on 1st February, 1843, with interest at 6 per cent per annum, payable half yearly. Two payments, viz., of \$34.32 and \$88, were made on 28th January, 1840, and indorsed on the bond. On the 28th November, 1842, the defendant, by an instrument under his hand and seal, assigned to the plaintiffs the bond and mortgage, and the moneys to grow due thereon, with the interest, in consideration of \$204, paid to him by the plaintiffs, and covenanted that there was then due on the bond and mortgage the sum of \$204, with interest at 6 per cent per annum, from 1st of Feb. 1840. On the *same* 28th of Nov. 1842, the defendant also indorsed on the *bond* and subscribed, the following guaranty, but did not affix his seal to it, viz.

"I Jonathan Rogers, of the city of Brooklyn, do hereby guarantee the *payment* of the *within bond*, when due. Witness my hand and seal, the twenty-eighth Nov. 1842.

JON. ROGERS."

The body and signature were in the defendant's hand-writing. The assignment and the guaranty were both subscribed by the defendant. The action was brought upon this guaranty. The amount due on the bond, at the trial, was admitted to be \$204, with interest at 6 per cent from 1st Feb. 1840, and due demand of payment and notice of non-payment had been given. The counsel for the defendant moved for a nonsuit, on the ground that the guaranty was not under seal, and that there was no consideration for the guaranty expressed in it. The court granted the nonsuit, and the defendant excepted. The case was submitted on points argued at length by the plaintiff, but the defendant merely repeated his points taken at the circuit.

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Wm. E. Dunscomb, for the plaintiffs.

J. P. Rolfe, for the defendants.

By the Court, MITCHELL, J. Here the assignment and the guaranty were executed at the same time, and relate to the same subject matter; and it is well contended, that they are therefore to be construed as but one instrument. This principle has been repeatedly recognized in our courts. In *Cornell v. Todd*, (2 Denio, 133,) Bronson, Ch. J. says, "it is undoubtedly true, that several deeds or other writings executed between the same parties, at the same time, and relating to the same subject matter, and so constituting parts of one transaction, should be read and construed together as forming parts of one assurance or agreement;" and that "it is not necessary that the instruments should in terms refer to each other, if in point of fact, they are parts of a single transaction." He held, however, that the rule did not apply when two deeds related to two *distinct parcels* of lands, because then they did not relate to the same subject matter. The same principle is applied by Cowen, J. in *Hall v. Adams*, (1 Hill, 603,) to an assignment of a lease, a covenant by the assignee, and two sealed notes given by the assignee. He held they were to be "considered as one instrument, for they were all executed at the same time and relate to the same subject."

In *Jackson, ex dem. Watson, v. McKenny*, (3 Wend. 233,) it was applied to a deed, absolute on its face, from a mother to her son, and to a covenant back from the son to the mother, referring to the deed and declaring the intention to be that the mother should receive the income during her life. Both were held to be one instrument, and so the intention of the mother to *retain* a life estate in herself, notwithstanding the absolute form of the deed, was sustained. Sutherland, J. says, (p. 234,) "It has been repeatedly held, that when two instruments are executed at the same time, between the same parties, and relating to the same subject matter, they are to be construed together, and considered as forming but one contract or agreement. In *Stow v. Tift*,

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(15 *John*. 463,) Spencer J. says, "I am authorized to say, by the decision of this court in *Jackson v. Dunsbagh*, (1 *John*. Cases, 95,) that when two instruments are executed at the same time, between the same parties, and relating to the same subject matter, they are to be taken in connection, as forming together the several parts of one agreement." And the court applied the rule to a case where the husband bought lands and gave back a mortgage at the same time, for part of the purchase money, his wife not joining with him, and held that on his death his widow could not be endowed of these lands. The same thing had been held, for the same reason, in *Holbrook v. Finney*, (4 *Mass. R.* 569,) where Ch. J. Parsons said, "The two instruments must be considered as parts of one and the same contract between the parties, in the same manner as a deed of defeasance forms, with the deed to be defeased, but one contract, although engrossed on several sheets." Spencer, Ch. J. says, (15 *John*. 463,) in those cases, "The bargainor sells the land to the bargainee *on condition* that he pays the price at the stipulated time, and if he does not, that the bargainor shall be reseised of it, free of the mortgage. And whether this contract is contained in one and the same instrument (as it well may be,) or in distinct instruments executed at the same instant, can make no possible difference."

In *Jackson, ex dem. Trowbridge, v. Dunsbagh*, (1 *John*. Cases, 91,) the same principle was recognized, and applied to a deed from a father to his son, and articles of agreement between them, of the same date.

Here it is only necessary to read the papers to see the agreement of the parties: it was, that in consideration of \$204 paid by the plaintiffs to the defendant, he assigned the bond and mortgage to them and covenanted that \$204 and interest were due on it, and guaranteed the payment of the bond when due. The identity of the dates shows it was but one transaction, executed at one time, and for one consideration. It could not have been clearer what the actual agreement was if it had been all in one paper, and the authorities show that there being several papers does not prevent the agreement from being one.

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If the defendant had executed an assignment of the bond, and then subscribed his name; then added a covenant that the principal was due, and again subscribed his name; then added this guarantee, and again subscribed his name, and delivered all three agreements at one time on one or three pieces of paper, it could not be doubted that the whole would be regarded, and would be in fact, but one agreement, and that one consideration was given for all parts of it. Without each of those parts, the plaintiffs would not have parted with their money. But here it is even more favorable to the plaintiffs; the papers clearly refer to each other; the assignment is expressly of the bond. It is therefore of the bond as it was when assigned and delivered, with the payments indorsed and with the guarantee also indorsed, and the guarantee is for the payment of "the *within* bond," which is the bond described in the assignment. The bond and the guarantee are thus almost embodied in the assignment, and ought so to be considered rather than to defeat the clear intent of the parties; especially in a case where the defense has nothing to commend it. None of the dangers against which the statute of frauds was designed to guide could arise here. The plaintiffs make no attempt to produce parol evidence to make out the contract; but show a contract in writing, subscribed by the defendant and containing the consideration of the contract.

There should be a new trial, costs to abide the event.

[NEW-YORK GENERAL TERM, March 8, 1851.—*Edmonds, Edwards and Mitchell, Justices.*]

HASSARD vs. ROWE and others.

Where a guardian advances money out of his own pocket, for the erection of buildings upon the land of his ward, without the order of a court of equity, he can not recover the amount from his ward.

IN EQUITY. This was an appeal by the plaintiff, from a decree made at special term dismissing the bill of complaint.

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The bill was exhibited, in the late court of chancery, to enforce the reimbursement out of the proceeds of the real estate of the defendants, of money advanced by the complainant, for improvements on such real estate, while he was their guardian of person and estate. The father of the defendants died in 1832, intestate, leaving a lot with two houses thereon at No. 6 Goerck-street, in the city of New-York, and a leasehold interest in the premises No. 125 Anthony-street, in said city, which, by the death of their mother in 1836, became the exclusive property of the defendants. The mother in her will appointed A. O. Brodie her executor, and left to him in trust \$800 for each of the children, the proceeds to be applied to their education, and when they became 18 the principal paid them. The amount of these two funds, when bill filed, was about \$1710, and each had also in the Life Insurance and Trust Company \$125. The Goerck-street property was subject to a mortgage of \$2400, the house upon it was insured for \$3000. It was burnt in 1836, and the plaintiff received the insurance money, with which, and \$1490 of his own money, he erected two houses on Goerck-street. The advance of \$1490 was without any application to the court, and the plaintiff had no security, but alledged that the estate was benefited in value by this advance, and claimed to be reimbursed out of the estate.

Stevens & Hozie, for the plaintiff. I. The plaintiff having acted in good faith, and for the manifest benefit of the infants. must be protected by this court. (*Pierson v. Shore*, 1 *Atk.* 480. 1 *Vern.* 437, *note*. *Fontaine v. Pellet*, 1 *Ves.* 337. *Smith v. Smith*, 4 *John. Ch. Rep.* 201. *Thompson v. Brown*, 4 *Id.* 619. *Bonsall's appeal*, 1 *Rawle*, 266. *Ronald v. Barkley*, 1 *Brock.* 356. *Belchier v. Parsons, Ambler* 219. *Defendirfer v. Winder*, 3 *Gill & John.* 311. 2 *Story's Com. on Eq.* 242, 512, 514. *Field v. Schieffelin*, 7 *John. Ch. Rep.* 154.) II. A guardian is bound to keep up and sustain his ward's estate, and must be allowed for necessary repairs. He has a lien on the premises for such disbursements. (2 *R. S.* 86.

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2 Kent, 229, 4th ed. *Bonsall's appeal*, 1 Rawle, 266. *Ronald v. Barkley*, 1 Brock. 356. *Green v. Winter*, 1 John. Ch. 27. *Methodist Ep. Ch. v. Jaques*, Id. 450. *Davoue v. Fanning*, 2 Id. 252. *Murray v. De Rottenham*, 6 Id. 52, 62, 67. *Palmer v. Danby*, *Prec. in Chancery*, 137, *Hooper v. Eyles*, 2 Vern. 480. *Robinson v. Ridley*, 6 Madd. 2. *Newton v. Poole*, 12 Leigh, 113, 140.) III. This court will approve and sustain an act when done, which on application it would have ordered to be done. (*Inwood v. Twyne*, Amb. 419. 2 Eden, 150. 1 Bro. C. C. 368. 3 Bro. 60, 401. *Lee v. Brown*, 4 Ves. 369. *Howe v. Earl of Dartmouth*, 7 Id. 150. *Eckford v. De Kay*, 8 Paige, 89. 6 Id. 390.) IV. The referee rests his opinion on the ground that "the claim in this case is not for repairs, nor for advances made in an exigency to save the estate from loss." We insist that the rebuilding in the present instance was a repair. It has been decided that the covenant of a tenant to repair would require him to rebuild. (*Taylor's Land. and Ten.* 172.) V. The money expended by the guardian has been invested in property of which the defendants are in possession, and not denied to be of the value stated by the plaintiff.

Edw. Clark, for the defendants. I. The complainant had no authority to make the advances in question for the purpose of erecting buildings on the premises of the infants, and he can not set them up now as a charge against the infants, or their estate. 2 R. S. 153, § 20, 1st ed. extends the powers of the guardian so far as to allow him to *keep up and sustain* the houses of his ward with the issues and profits thereof, *and with such other moneys belonging to his ward as he shall have in his hands*. This is the full extent of his authority in this behalf. II. This is not one of that class of cases where the court of chancery will confirm the acts of a guardian or trustee done in good faith, though not strictly legal when performed. (*Putnam v. Ritchie*, 6 Paige, 390.) That class of cases is confined to instances where the illegal act embraced a fund belonging to the infant, but which was in the legal power and disposition of the guardian ;

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or where it embraced property of which the legal estate was in trust, so as to place it fully within *the power of the court of chancery*, as the general guardian or protector of the rights of infants. (*Putnam v. Ritchie*, 6 *Paige*, 390, 401.) III. The court of chancery will not give relief to a complainant who has made improvements upon land, *the legal title to which is in another*, where there has been neither fraud nor acquiescence on the part of the latter, after knowledge of his rights. (*Putnam v. Ritchie*, *supra*. *Story's Eq.* § 1238. 2 *Kent's Com.* 334, 5.) The case of a guardian is no exception to this rule. (*Putnam v. Ritchie*, *supra*.)

EDWARDS, J. The defendants in this case, while they were infants, were seised and possessed of a lot of land, and the buildings thereon, situated in the city of New-York. The buildings, which were insured at \$3000, were destroyed by fire. The whole amount of the insurance money was collected and received by the plaintiff, who at that time was guardian of the defendants. After the fire, the plaintiff erected two houses upon the said lot, and in so doing expended the sum of \$1490 of his own money, in addition to the sum received upon the insurance, and which he now claims that he is entitled to recover from the defendants.

As a general rule, a guardian is not authorized to dispose of the property of his ward, except for his maintenance and education, without the order of a court of equity. It has been held, however, that he may without such order, change the property of his ward from real into personal, and from personal into real estate, in cases where there is no express statutory restriction, and where the change is manifestly for the advantage of the infant. (*Eckford v. De Kay*, 8 *Paige*, 90. 2 *Kent's Com.* 230.) But amongst the numerous authorities which were cited upon the argument, no one was referred to in which the rule has been so far extended as to embrace a case like the one before us. And, however equitable the claim of the plaintiff may be, we concur in the remark which was made by the late chancellor in the case of *Putnam v. Ritchie*, (6 *Paige*, 395,) that we are

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not authorized to introduce a new principle into the law of this court, without the sanction of the legislature.

The appeal must be dismissed with costs.

EDMONDS, P. J. concurred.

MITCHELL, J. dissented.

Appeal dismissed.

[NEW-YORK GENERAL TERM, March 8, 1851. *Edmonds, Edwards and Mitchell, Justices.*]

THE PEOPLE vs. HUGH WHITE.

The taking of private property for public use can only be justified by virtue of the sovereign right of eminent domain.

Before the organization of our government, this right was exercised throughout the civilized world, and its exercise restricted to cases of public necessity and just compensation.

The provisions on this subject in the constitutions of the United States, and of the state of New-York, are only declaratory of a previously existing universal principle of law.

Where land belonging to a citizen was taken under the act of 1819, for the construction of the Erie canal, and used as the bed of the canal for a number of years, and was afterwards abandoned by the state, and the canal located in a different place; *Held* that such land, when no longer necessary for public use, reverted to the original owner, although the act under which it was taken declared it should vest in the state, in fee simple.

THIS was a case submitted to the court, by the parties, for its decision, without action, under section 372 of the code, upon the following statement of facts: In 1819 the canal commissioners, under and by virtue of, and in conformity with, an act of the legislature, passed on the 7th of April, 1819, entitled "An act concerning the great western and northern canals," in behalf of the state entered upon and took possession of a certain piece of land now in the village of Cohoes, particularly described in the submission, and occupied the same in the construction and as

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part of the bed of the Erie canal, and so used the same as part of the bed of the canal, until about the year 1842, when that part of the said Erie canal was entirely abandoned, and still is, and a new canal was constructed in another place, with the intention of never again using the land in question for the purposes of said canal. When the said land was so taken the said Hugh White was the owner thereof in fee simple, and since the abandonment thereof by the state he has taken and now holds possession of the said premises, claiming to be seised in fee thereof. The question submitted for decision was whether or not the state was the owner, in fee simple, of the land; or in other words, whether, under the statute referred to, the state took any thing more than the right to use the land for the purposes of a canal so long as it was appropriated to, and used for that purpose.

L. S. Chatfield, attorney general, for the plaintiffs.

D. McMartin for the defendant.

By the Court, PARKER, J, I think it is fairly to be inferred from the case, though it is not stated in terms, that the land in dispute, taken by the canal commissioners for the Erie canal in 1819, was duly paid for according to the appraised valuation. The only question to be decided, therefore, is whether the plaintiffs continue to be the owners of the land since the abandonment of it in 1842, when a canal was constructed in another place, with the intention of never again using the land in suit for the purpose of a canal.

What title then did the plaintiffs get, by virtue of the acts of the legislature and the proceedings under them? The act of 1817, chap. 262, sec. 3, (*Sess. Laws of 1817, p. 263*), authorizes the canal commissioners to take possession of any lands, waters and streams "*necessary for the prosecution of the improvement intended by*" that act, and points out the mode in which the damages shall be ascertained. It also directs the canal commissioners to pay such damages, and then declares "the fee simple of such premises so appropriated shall be vested in the people

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of this state." By the 3d section of the act of 1819, (*Sess. Laws of 1819, p. 123.*) under which the land in suit was taken, most if not all of the provisions of the third section of the act of 1817 are adopted; and though it does not contain the same express declaration as to the title to be vested in the people of this state that is contained in the act of 1817, yet I think such was the intention of the act. And I shall assume that this provision of the act of 1817 is therefore applicable to this case.

It may well be doubted whether the language of the act is sufficient to vest in the people a fee simple absolute. Though the estate is declared to be a fee simple, yet it may be a determinable fee. By fee simple is generally meant a fee simple absolute; but fee simple and fee are often used as convertible terms. (1 R. S. 722. 4 *Kent's Com.* 4, note d. 5 *T. R.* 107.) A qualified, base, or determinable fee, is an interest which may continue for ever, but is liable to be determined by some act or event circumscribing its continuance or extent. (4 *Kent's Com.* 9.) Although in this case the statute declares the estate to be a fee simple, yet it has been doubted whether it intends a fee indefeasible or indestructible. (*See Rep. of Canal Board, Ass. Doc. No. 187, of 1841.*) Is it not in fact a fee limited to the purposes for which it was created? The whole section, carefully examined, seems to imply such a limitation. The commissioners are only authorized to take possession of, and use such lands as are "*necessary for the prosecution of the improvements intended*" by the act; and it is only a fee simple of the premises "*so appropriated*" that is vested in the people of the state. The state has no right to take what is not necessary for the improvement. I see no reason why this restriction does not apply as well to the duration of the estate as to the extent of the actual occupation. When the canal is abandoned, the land taken can no longer be said to be "*necessary to the prosecution of the improvement*;" and it is only to the extent of the land "*so appropriated*" which is taken, appraised and paid for according to the previous provisions of the section, that the title is declared to vest in the state.

That it was not the design of the legislature to vest in the

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state a fee simple absolute in the lands taken for the bed of the canal, is also inferrible from other provisions of the same section of the statute. The appraisers are directed to make a just and equitable estimate of the loss and damage, if any, over and above the benefit and advantage to the respective owners by and in consequence of making and constructing the works aforesaid. It is not the value of the land that is to be ascertained, but the loss and damage: and from this the deduction for benefit to the owner is to be made. This deduction also forms a part of the consideration for the transaction, and implies that the benefit is to be continued to the owner of the land as long as it is held for public use. It is upon this principle that the damages are appraised.

In all cases, then, this deduction for benefit to the owner is to be made; and if, after the canal is abandoned and the owner ceases to derive any benefit from its proximity, the state can still retain the land, it is taking private property for public use without making just compensation. Independent of the question of constitutional prohibition, which I shall hereafter consider, the statute should not unnecessarily receive a construction productive of so great injustice.

The general turnpike act, passed March 13, 1807, (1 *R. L.* 231,) provided for taking necessary land, and appraising the damages, and contained the following clause: "And the said president and directors aforesaid, upon paying the said several owners of the said lands the several sums so assessed and awarded by the said appraisers in their said inquisition, shall and may have and hold *to them and their successors and assigns forever*, the lands and tenements in the said inquisition described." It was the legal effect of this language to convey a fee, as plainly as if the words "fee simple" had been employed, as was done in the act of 1817, above cited. But it has been adjudged that where land taken for a turnpike had been abandoned, it reverted to the original owner. In *Hooker v. Utica and Minden Turnpike Co.* (12 *Wend.* 71,) the court said, "although the act of incorporation vests in the company the title to the lands over which the road passes, on compliance by them with the provis-

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ions of the act, such title must nevertheless be considered as vested only for the purpose of a road, and when the road is abandoned the land reverts to the original owner."

But whatever may be the construction given to the statute, it may be well in this case to look beyond it and see how far the legislature has power to go, in taking the property of the citizen. The taking of property for public use can only be sanctioned by virtue of the sovereign right of eminent domain. Long before the organization of our government this right was recognized, throughout the civilized world, and its exercise restricted to cases of public necessity and just compensation. (*Grotius De Jur. B. and P. b. 8, ch. 14, s. 7. Puf. De Jur. Nat. et Gent. b. 8, ch. 5, s. 7. Bynckershoek Quæst. Jur. Pub. b. 2, ch. 15. 1 Bl. Com. 139. 2 Kent's Com. 339.*) At the time the land in suit was taken, in 1819, this principle had been made a part of the constitution of the United States, which provided (*Art. 5 of Amendments*) "Nor shall private property be taken for public use without just compensation." Subsequently this same language was made part of our state constitution adopted in 1822. (*Const. of 1822, art. 7, sec. 7.*) It is true the provision in the constitution of the United States has been decided to be only restrictive upon the general government and its officers. (*2 Cowen, 818. 8 Wend. 100. 7 Peters, 243.*) But the clause thus inserted in the constitution was only declaratory of a previously existing and universal principle of law; (*2 Kent, 339;*) and it was recognized by the courts of this country long before it was incorporated into our state constitution. (*Gardner v. Village of Newburgh, 2 John. Ch. Rep. 166. 20 John. 105, 735. 17 Id. 215. Baldwin's C. C. Rep. 219. 3 Story's Com. 661. 3 Kelly, 43.*) The unwritten constitutional law governs this case. This question is therefore to be tested by the same rules as if the land had been taken since the adoption of the constitution of 1822.

The taking of private property, then, can only be justified when it is taken for public use, and on payment of just compensation. It is only by virtue of this principle, and under this restriction, that land is taken for public roads, turnpikes, rail-

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ways, &c. All are placed upon the same footing, and are subject to the same limitations. The right acquired is a mere easement, or servitude as it is called in the civil law—a right to use—and when the use is abandoned the title reverts to the former owner. This principle has been repeatedly adjudged with regard to public roads, and streets in cities. (15 *John*. 447. 1 *Wend*. 262. 2 *Id*. 472. 6 *Id*. 461. 8 *Wend*. 85. 11 *Id*. 150. 12 *Id*. 98. 4 *Hill*, 140. 5 *Paige*, 159.) And I think it equally applicable to canals.

If the state may retain this land, thus compulsorily taken, after it has been abandoned for the purpose of a canal, it may sell it to some other citizen. This could not be justified under a permission to take private property for public use. It would be taking the property of one citizen and transferring it to another. In other words, it would be taking private property for private or individual use; and it would be a plain violation of the constitutional provision in question, and a gross outrage upon the rights of the citizen. Upon this subject we are not without ample authority. In the *Matter of Albany-street*, (11 *Wend*. 150,) the court had under consideration section 179, 2 Rev. Laws, 416, which authorized the commissioners, if they should deem it expedient, where part of a lot only was necessary, to take the whole lot and sell such part as was not required for public use; and it was held to be unconstitutional and void. The court said, "if it is to be taken literally that the commissioners may, against the consent of the owner, take the whole lot, when only a part is required for public use, and the residue to be applied to private use, it assumes a power which, with all respect, the legislature did not possess. The constitution, by authorizing the appropriation of private property to public use, impliedly declares that, for any other use, private property shall not be taken from one and applied to the private use of another. It is a violation of natural right, and if it is not in violation of the letter of the constitution it is of its spirit, and can not be supported." (See also *Bloodgood v. Mohawk and Hud. Railroad Co.* 18 *Wend*. 9, 59; *Matter of John and Cherry streets*, 19 *Id*. 659; *Varick v. Smith*, 5 *Paige*, 137; *Taylor v. Por-*

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ter, 4 Hill, 143.) These cases all agree that the legislature has no power to permit private property to be taken for any other except public use, and that any enactment interfering, beyond this limit, with the right of the citizen is void. I am satisfied there is no power to retain land compulsorily taken for the purpose of constructing the canal, after the canal has been abandoned, and the land has ceased to be necessary for the public use. If therefore the broadest construction of the statute of 1817 be adopted, as claimed by the plaintiffs, it would afford no constitutional protection.

There is another ground upon which I think the plaintiffs' title can not be sustained. The defendant has had no just compensation for his land. Compensation was made to him on the supposition that he was to be benefited by the location of the canal on his premises, and it was only the damages, over and above such benefit, that were awarded to him. That benefit has now ceased, by the abandonment of the canal, and the compensation can no longer be regarded as justly made. I think this view is fully sustained by the ruling of the court in *Gardner v. The Trustees of the Village of Newburgh*, (2 John. Ch. 162.) That case was decided in 1816, before the clause which authorizes private property to be taken for public use was made a part of the state constitution. In that case the legislature had failed to provide a just compensation; and they have certainly failed to require a just compensation in this case, if the title they have vested in the state can endure any longer than the defendant is to enjoy the benefit of the canal. The great injustice of a different conclusion is apparent. Suppose the benefit to the owner is deemed equal to the damages for the taking of the land. The owner gets nothing for his land. Then the canal is abandoned. If the state can retain the land, the owner loses its whole value.

For the reasons above stated I think the plaintiffs have no title to the land, and that the defendant should have judgment.

[ALBANY GENERAL TERM, May 5, 1851. *Harris, Watson and Parker*, Justices.]

HUNTER *vs.* OSTERHOUDT.

Payments made by a tenant to his landlord on account of rent, generally, will, in the absence of any direction by the tenant and any agreement of the parties, be applied by the law on the rent due at the time, and not on the rent then accruing.

It is only where rent is paid which accrued after a forfeiture, that the acceptance of such payment is considered an affirmance of the lease, and a waiver of the forfeiture. The acceptance of rent which accrued prior to the right of entry is not a waiver of the forfeiture.

Where, upon the trial of a cause the only objections made by the defendant rest entirely on legal grounds, which are overruled by the judge, and the judge charges that the plaintiff has a right to recover, without any exception being taken to the charge, the defendant can not afterwards object that a question of fact should have been submitted to the jury.

THIS was an action of ejectment, tried before Hon. S. Barculo, late circuit judge, at the Sullivan circuit, in May, 1847. The farm in question was occupied by the defendant, and contained 100 acres of land. It had been leased by the plaintiff to the defendant in 1828, by a perpetual lease; the rent reserved being eighteen pence an acre, payable the 1st of June of every year, with a clause of re-entry if the rent should remain unpaid for four months. It was proved that the amount of rent due and unpaid, without interest, on the 1st of June, 1845, was \$200.75. The time laid in the declaration was the tenth of June, 1846, and the declaration was served on the 14th of August, 1846. The plaintiff also proved personal service on the defendant of a notice requiring payment of the rent in fifteen days. The defendant proved two receipts, signed by the plaintiff's agent, one dated October 17, 1845; acknowledging the receipt from the defendant of \$5.46 in road work "on account of rent for farm No. 231," the farm in question. The other receipt was dated 17th November, 1845, and was for \$5.50, and also expressed to be "on account of rent for farm No. 231."

The defendant moved for a nonsuit which was refused, and the judge directed a verdict for the plaintiff. The defendant applied for a new trial, on a case agreed upon by the parties.

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H. Hogeboom, for the plaintiff.

H. C. Van Vorst, for the defendant.

By the Court, PARKER, J. Two points are made by the defendant. The first is, that the acceptance of rent in October and November, 1845, was a waiver of the forfeiture. The rent fell due annually, on the first day of June, and the lease reserved the right of re-entry if the rent was not paid in four months thereafter. The forfeiture did not therefore happen till the first day of October, and the last forfeiture that had occurred before this suit was commenced was on the first day of October, 1845. Subsequent to that day, and in October and November of the same year, two payments were made, "on account of rent" of the farm, as is stated in both of the receipts. It is important to ascertain whether these payments were to be applied on the rent then due, or on the rent of the then current year. No directions were given by the debtor, as to the application of the payments, nor was any agreement on the subject made by the parties, except generally, as above stated. The rule is that if the debtor does not direct the application, the creditor may apply the payment as he pleases. (*Mayor v. Patten*, 4 Cranch, 317. *Stone v. Seymour*, 15 Wend. 19. *Allen v. Pulver*, 3 Denio, 284.) If the creditor does not make the application, the law will apply it towards the extinguishment of the debt first due; (*United States v. Kirkpatrick*, 9 Wheat. 720. *Allen v. Culver*, 8 Denio, 284. *Seymour v. Van Slyck*, 8 Wend. 403. *Webb v. Dickinson*, 11 Id. 62. *Huger v. Bocquet*, 1 Bay, 407;) and to interest in preference to principal; (*Fruzier v. Hyland*, 1 Har. & John. 98. *French v. Kennedy*, 1 Barb. Sup. C. Rep. 455;) and such application must be made on an indebtedness then existing. (*Baker v. Stackpoole*, 9 Cowen, 420. *Law's Ex'rs v. Sutherland*, 5 Grattan's Va. Rep. 357.)

It is plain, under these rules, that the payments thus generally made as the rent, will, in the absence of any direction of the defendant, and any agreement of the parties, be applied by the law on the rent then due, and not on the rent then accruing.

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That question being settled, the payments were no waiver of the forfeiture. It is only where rent is paid which accrued after the forfeiture that such payment is considered an affirmance of the lease and a waiver of the forfeiture. Payment of rent which accrued prior to the right of entry is not a waiver of the forfeiture. The reason for this distinction is obvious, and the distinction itself is well established (1 *Coke's Rep.* 64. 6 *Term Rep.* 220. *Woodfall's Land. and Ten.* 203, 496. *Cowper's Rep.* 243, 803. *Coke Litt.* 211, 215. *Cro. Eliz.* 3. 1 *Saund.* 237, note 16. *Adams on Eject.* 160. 2 *Term Rep.* 430. 4 *Taunt.* 735. *Jackson v. Allen*, 3 *Cowen*, 230. *Jackson v. Sheldon*, 5 *Id.* 448. *Bleecker v. Smith*, 13 *Wend.* 530. *Conway v. Starkweather*, 1 *Denio*, 114. *Smith v. Saratoga Co. Mu. Fire Ins. Co.*, 3 *Hill*, 508.)

The other point made by the defendant is that it should have been submitted to the jury to say whether the payments were a waiver of the forfeiture. It is a sufficient answer to this objection that no such ground was taken at the trial. The only objection made by the defendant rested entirely on legal grounds, which were overruled by the judge, on a motion for a nonsuit. The judge then charged that the plaintiff had established a right to recover. No exception was taken to the charge, nor was the judge requested to submit any question to the jury. Both parties evidently regarded the case as turning upon questions of law, and the defendant is not at liberty now to assume a different ground.

The motion for a new trial must be denied.

[ALBANY GENERAL TERM, May 5, 1851. *Harris, Watson and Parker*, Justices.]

HOUSTON vs. SHINDLER.(a)

The plaintiff and defendant bargained respecting the sale, by the former to the latter, of a quantity of lumber, piled apart from other lumber, on a dock and in view of the parties at the time of the bargain, and which had before that time been measured and inspected. The parties having agreed as to the price, the plaintiff said to the defendant, "*the lumber is yours;*" "*get the inspector's bill and take it to H., and he will pay you the amount.*" This was done the next day, and payment was refused. The price was over fifty dollars, and the plaintiff sued the defendant therefor in a justice's court; whereupon before the trial, R., the attorney for the plaintiff, and H., acting as attorney for the defendant, but without authority from the latter, settled the suit for forty-one dollars, and H. gave his check, post-dated one month, to R., on a bank, for the amount, and R. gave a receipt in full as for so much money. The defendant, with full knowledge of this settlement, took possession of the lumber and carried it to market. *Held*, 1. That the taking possession of the lumber by the defendant was a completion of the purchase, and obviated the objection of the statute of frauds. 2. That it was a ratification of the act of his agent, by subsequent assent.

The check having been dishonored by the bank, for want of funds, and H. the drawer being insolvent and having obtained his discharge in bankruptcy, *Held further*, that on surrendering the check, the plaintiff was entitled to recover for the value of the lumber, as for goods sold.

The *consideration* of a receipt is open to explanation.

THIS action was commenced on the 16th of November, 1842, in the justices' court of the city of Troy. It was an action of assumpsit for goods sold and delivered, and was tried under the plea of the general issue, and notice, and the plaintiff obtained judgment. The defendant appealed to the mayor's court of the city of Troy, and on the trial in that court the case was this: The plaintiff, being the owner of about 2070 feet of curled maple plank and scantling, which he had brought to Troy in a boat, and which after being inspected and measured was piled on the dock, apart from other lumber, met the defendant at the pile of lumber, when the following facts occurred. The plaintiff said to the defendant, "What will you give for the plank?" The defendant replied he would give three cents a foot. The plaintiff then asked, "What will you give for the scantling?" The de-

(a) See *S. C. 1 Denio*, 48; 1 *Comst.* 261.

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defendant answered, one and a half cent a foot. The plaintiff then said, "The lumber is yours." The defendant then told the plaintiff to get the inspector's bill of it, and carry it to Mr. House, who would pay it. The next day the plaintiff, having procured the inspector's bill, presented it to House, who refused to pay it, on the ground that the instructions he had received from the defendant did not correspond with the plaintiff's statement of the contract. There was no note or memorandum of the contract in writing, nor was there any evidence of a delivery or acceptance of the lumber, except as above stated. At the price agreed on, the lumber came to \$52,51, no part of which was ever paid. The mayor's court instructed the jury, that if they were satisfied that it was the intention of the parties to consider the lumber delivered, at the time of the bargain, and that nothing further was agreed or contemplated to be done, in order to change the title in, or possession of the lumber, the plaintiff was entitled to recover; that the sale was not within the statute of frauds, and did not require any note or memorandum in writing, provided they should find from the evidence that there was delivery and acceptance of the lumber at the time of the bargain. The defendant excepted, and the jury found a verdict for the plaintiff, on which judgment was rendered in his favor. The supreme court, on writ of error to the mayor's court, affirmed the judgment. The case is reported 1 *Denio*, 48. The defendant brought a writ of error to the court of errors, which was argued in the court of appeals; and at the April term, 1848, the judgment of the supreme court was reversed by a vote of six to two, and a new trial ordered. The court of appeals decided that the above facts did not prove a delivery and acceptance of the lumber, within the meaning of the statute of frauds, and that the sale was therefore void. They held also that to constitute a delivery and acceptance of goods, such as the statute requires, something more *than mere words* is necessary. Superadded to the language of the contract, there must be some *act* of the parties, amounting to a transfer of the *possession*, and an acceptance thereof by the buyer; and that the case of cumbrous

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articles is not an exception to this rule. The case in the court of appeals is reported in 1 *Comstock's Rep.* 261.

The cause was then tried at the Rensselaer circuit in February, 1849, before Mr. Justice Harris, when, in addition to the facts proved on the first trial, the following facts were given in evidence. It was shown that in July, 1842, the plaintiff employed Mr. Raymond, an attorney, to collect the accounts for the lumber sold the preceding year, and that Raymond brought an action against the defendant, in the justices' court of the city of Troy, to recover the said account. While the action was pending, and before trial, and on the 6th July, 1842, Raymond acting as attorney for the plaintiff, and Orla House, acting as attorney for the defendant, but without authority, settled that suit and cause of action for \$41, and House gave his check, post-dated 6th August, 1842, to Raymond, on the Troy City Bank, for that sum, and Raymond gave to House a receipt in full as for so much money. House was indebted to the defendant on account, and the latter gave the former credit on book for the amount of the check as for so much money paid for him. The check was presented at maturity, but was not paid, the drawer having no funds there, and in fact he failed and was discharged under the bankrupt act. Between the time of that settlement and the maturity of the check (6th August) the defendant took possession of the lumber, and caused it to be transported to New-York. At the time he took it, he said "House had been and settled for the lumber against my orders, and now it is settled for, we may as well take the lumber off." House was present when the defendant made that remark.

After the lumber was thus taken away by the defendant, and the check had been protested and House had failed, to wit, on the 16th Nov. 1842, this action was commenced. On the trial in the justices' court the check was delivered up to be cancelled.

The defendant's counsel asked the judge to charge, that as the settlement of the suit between House and Raymond was without authority from the defendant, the defendant could not be made liable as on a contract of sale. The judge refused so to charge, and the defendant's counsel excepted.

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The defendant's counsel also asked the judge to charge, that even if the defendant was liable to pay for the lumber, no action would lie until after the check was returned and the defendant notified that it was not paid. The judge refused so to charge, and the defendant again excepted.

The defendant's counsel asked the judge to charge, that if the jury believed Raymond was authorized to settle the suit, the receipt given by him in full, the acceptance of the same and credit of it by the defendant to House, upon the supposition that the money was paid by House to Raymond, as the receipt purports, the plaintiff could not sustain this action. The judge refused so to charge, and the defendant excepted. The defendant's counsel also requested the judge to charge that the lumber should have been demanded before suit brought, in order to sustain the action. The judge refused so to charge, and the defendant's counsel again excepted.

The judge charged the jury, among other things, that it appeared that House and Raymond assumed to act as agents for the plaintiff and defendant, in the settlement of the suit pending in the justices' court, and although they might have acted without authority from the parties, still their acts were binding, if subsequently ratified and assented to by them. And he left it to the jury to find, from the acts and declarations of the plaintiff and defendant, and especially from the defendant's receiving the lumber and directing it to be shipped to New-York, and his declaration to West, in the presence of House, that the parties to this suit had assented to and ratified the acts of Raymond and House; to which charge the defendant's counsel excepted.

The jury found a verdict for the plaintiff.

J. Pierson, for the defendant.

J. A. Spencer, for the plaintiff.

By the Court, WILLARD, P. J. The facts disclosed on the last trial obviate all the objections to the plaintiff's right of recovery, which existed when the cause was before the court of

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appeals. As required by that court, the plaintiff showed, in addition to the language of the contract, the *acts* of the defendant in taking possession of the lumber and converting it to his own use. The statute of frauds therefore presents no barrier to a recovery.

The objection now is, that as the plaintiff's agent gave a receipt in full, for a worthless check, on settling the first suit, no subsequent action can be brought for the same cause. Although the receipt purported to be for "forty-one dollars in settlement of suit," it was competent for the plaintiff to show, in explanation, what was in truth received. The *consideration* of a receipt is always open to explanation. (*Eggleston v. Knickerbacker*, 6 Barb. S. Court Rep. 438.) In this case, the check for which it was given was of no value. The plaintiff acquired nothing from it. He had a right therefore to fall back upon his original cause of action, as if nothing had been paid.

Nor did the defendant lose any thing by crediting the amount of the check to House. He parted with no money or new consideration on account of it, but merely gave House credit for that amount on his book. This account against House is now as good as it was before such credit. It was probably worth nothing then or since, as House was insolvent in 1842, and subsequently obtained his discharge in bankruptcy.

If the judge was right in charging the jury that they might find, from the conduct of the parties, a ratification of the acts of their agents, there is no ground to disturb the verdict. The defendant, when he took away the lumber, well knew the nature and terms of the settlement. By taking it he assumed that the title to it was vested in himself. There can be no stronger ratification of the act of an agent, than the principal's availing himself of the benefit of such act, although unauthorized. (*Dunlap's Paley on Agency*, 171, notes. *Clark v. Van Riemsdyck*, 9 Cranch, 153. 4 *Mason*, 296. 17 *Mass. Rep.* 97.) It was well said by Spencer, Ch. J. in *Skinner v. Dayton*, (19 *John.* 554,) that "Both at law and in equity, the subsequent assent of the principal to the acts of the agent in relation to the interests and affairs of his principal, is equivalent to a positive and direct authorization to do the act."

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As the judge was thus right in the direction he gave, he could not have been right had he charged as the defendant's counsel requested. The law gives no countenance to the legerdemain, by which an obligation can be discharged by a check of a bankrupt on a bank without funds to meet it.

The other exceptions were all frivolous. The motion for a new trial must be denied.

[MONTGOMERY GENERAL TERM, May, 1851—*Willard, Hand and Cady* Justices.]

FOX vs. MCGREGOR and MAIN.

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Neither the keeper of a livery stable, nor an agister of cattle, has a lien on a horse delivered to him for keeping, without a special agreement to that effect.

An innkeeper has no lien upon a horse put into his stable, unless ^{delivered} ~~belonging~~ *by to a guest.* |||

An innkeeper can not, at common law, sell his guest's horse for his keeping. The remedy to enforce the lien is by action in the nature of a bill in chancery.

THIS was an action of trover for a horse. The conversion was stated to have been on the 14th of August, 1849, and the action was commenced before a justice of the peace, the week following. The plaintiff gave evidence tending to show that he was the owner of the horse, and that it was sold by an auctioneer, by order of the defendants on the 14th of August, 1849, and bid off by a stranger. On the part of the defendants, it was proved that they were innkeepers in the city of Troy, and that in their notice of sale, they claimed to sell the horse "by virtue of an innkeeper's license." It was proved by the defendants' hostler, that he found the horse tied, in the defendants' stable, about seven or eight weeks before the sale, and that he was regularly fed with hay and oats, up to the day of sale. The

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hostler did not know by whom the horse was put there, nor was there any evidence tending to show by whom he was put in the stable, or how he came there. It did not appear where the plaintiff, lived, or that he was ever in the city of Troy, either as a traveler or otherwise. The justice gave judgment for the plaintiff for the value of the horse, which the county court of Rensselaer county reversed. From which latter judgment the plaintiff appealed to this court.

E. F. Bullard, for the appellant.

Pierson & Smith, for the defendants.

By the Court, WILLARD, P. J. The justice must have found as a fact that the property of the horse was in the plaintiff, and that the defendants sold him under the pretense of a lien as innkeepers. The evidence clearly justified that finding. The sale was a conversion, and superseded the necessity of any demand, before the commencement of the action. The important question is whether the defendants showed any right thus to dispose of the horse. If the horse came into the defendants' inclosure as a *stray*, they had no right to sell him without pursuing the course pointed out by the revised statutes, relative to "strays." (1 R. S. 351.) It is not pretended that they obeyed the requisitions of this statute. Indeed they did not treat the animal as a stray, but claimed to sell it in satisfaction of their lien as innkeepers.

If the proof would have warranted the finding that the defendants were the keepers of a livery stable, *as there was no evidence of an agreement for a lien*, none attached upon the property. (*Wallace v. Woodgate*, 1 C. & P. 575. *Bevan v. Waters*, 3 Id. 520. *Yorke v. Grenagh*, 2 Ld. Ray. 866.) Neither the agisters of cattle nor the keepers of a livery stable have any lien, without a special agreement to that effect. (*S. C. and Richards v. Symonds*, 15 Law J., N. S. 35. 10 Jur. 6. 2 Kent's Com. 635. *Grinnell v. Cook*, 3 Hill, 485; where the cases on the subject are collected.)

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The defendants acquired no lien by virtue of their employment as innkeepers, unless the horse was delivered to them by a guest. (*Grinnell v. Cook*, 3 Hill, 485. *Binns v. Piggot*, 9 C. & P. 208, *Parke, J.*) If the guest was not the rightful owner of the horse, the lien would attach provided the innkeeper had no notice of the wrong, and acted honestly. (*Johnson v. Hill*, 8 Starkie, 172, *per Abbott.*) There is not the slightest evidence that this horse was ever delivered to the defendants, either by the plaintiff or any one else, as a guest. There was nothing, therefore, from which the justice could find that the defendants had a lien upon the horse.

But if the presumption may be drawn from the nature of the defendants' employment, that the horse belonged to one of their guests, still they had no right to sell it in satisfaction of their lien. Although there is a dictum to the contrary by Popham, Ch. J. in *Hostler's case*, (*Yelv. Rep.* 66,) it is settled that except within the city of London, an innkeeper can not, at common law, sell his guest's horse for his keeping. (*Jones v. Pearle*, 1 Str. 556. *Pothonier v. Dawson*, 1 Holt, N. P. 383. 2 *Kent's Com.* 642.) The remedy to enforce the lien is by action in the nature of a bill in chancery. (1 *Cowen's Tr.* 2d ed. 299.)

Under no aspect of the testimony were the defendants authorized to sell the horse in question. The judgment of the county court must be reversed and that of the justice affirmed.

[MONTGOMERY GENERAL TERM, May 5, 1851.—*Willard, Hand and Cady, Justices.*]

JOHN L. BUCKLEY vs. SARAH M. BUCKLEY, MOWRY and others.

All the erections connected with a cotton factory, and other mills propelled by water-power, including the dams, water wheels, and gearing, and machinery fastened to the ground or buildings, are *prima facie* a part of the realty, and descend to the heir at law of the owner, upon his death, and do not pass to his executors or administrators as a part of his personal estate.

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They will also pass to the remainderman, as between him and the tenant for life.

Real property, purchased for partnership purposes, with partnership funds, and which remains after paying the debts of the firm, and adjusting the equitable claims of the different members of the firm, as between themselves, is considered and treated as real estate.

The grantee or vendee of a tenant by the curtesy has all the rights of a tenant for life; and in respect to erections placed upon the premises by him for the purposes of trade, the question is substantially between a tenant for life and the remainderman.

The seisin of one tenant in common is the seisin of the others. Accordingly, where a person, in right of his wife, became a partner with others in the ownership of a cotton factory and other mills, and in the management of the business thereof, and received a proportionate share of the profits from the time his wife became interested in the property, until after her death; *held*, that this was a sufficient seisin of the wife to consummate the estate by the curtesy in the husband.

The rule in this state, as between grantor and grantee, vendor and vendee, mortgagor and mortgagee, and heir and personal representative of the deceased, is that whatever is annexed or affixed to the freehold, by being let into the soil or annexed to it, or to some erection upon it, to be habitually used there, particularly if for the purpose of enjoying the realty, or some profit therefrom, is a part of the freehold.

Where a devisee is the heir of the testator, he will take by descent, and not as purchaser, unless a different estate is given him, or there is a conversion; even if there is a charge upon the realty.

Where a testator directs that all his just debts and funeral expenses shall be paid by his executors, the charge is confined to property given to the executors. And if there is a devise of land to them, such land is chargeable with debts, unless otherwise specifically and entirely appropriated by the will.

Where a testator, by the residuary clause of his will, gives all the rest and residue of his estate and effects, real and personal, not therein otherwise effectually disposed of, after payment of his debts, legacies, funeral expenses, and other charges therein authorized, to his daughter, this creates a charge upon the *residuum*, in case there is a deficiency of personal property.

A charge merely, does not alter the rights of the parties to the realty, until enforced. Nor does a devise of lands in trust to sell and pay debts and legacies, if the devisee can not receive the rents and profits. Much less does a mere power to sell.

IN EQUITY. The bill in this cause was filed in December, 1847, and prayed that the copartnership of Wm. Mowry & Co.

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might be declared dissolved; an account taken of the assets thereof; the respective rights of the parties to the suit be ascertained and settled; and that the property might be divided or sold, the proper persons joining in the conveyance, and the proceeds divided according to their respective interests. In 1806, Wm. Mowry and Wm. Casey owned three-fourths of a cotton factory and other buildings in Greenwich, Washington county, N. Y. on the Battenkill. In 1807 they purchased of one Pettys over 14 acres lying on the Battenkill, in Greenwich and Easton. Upon this they built a cotton factory, and carried it on under the style and firm of "Wm. Mowry & Co." In 1808 Mowry & Casey conveyed one-third of all their interest in the property and concern to John Gale, and took him in as an equal partner. In January, 1812, Casey's interest was sold upon an execution, and bid off by John D. Dickinson. In March of that year Mowry & Gale released to D. all claim upon Casey's part of the property and admitted D. as a member of the firm. In August, 1812, D. by a deed and by assignment, transferred all his interest to Townsend McCoun, who was also thereupon admitted as a member of the firm. In December, 1812, Mowry conveyed a moiety of his interest in all the property, real and personal, to Samuel McCoun. In February, 1820, Whipple and others conveyed to said parties the remaining one-fourth of the land owned by Mowry & Casey in 1806. They also released all right to the 14 acres purchased of Pettys. This conveyance, and the release, were to Mowry, one-sixth; Gale, one-third; T. McCoun, one-third; and S. McCoun, one-sixth. The release recited that a dam across the Battenkill was mostly in the 14 acres, and valuable improvements had been made since Pettys conveyed it, by erecting a factory and other machinery on this parcel. And that disputes had arisen about the use of the water, &c. and that the releasées, naming them, "under the firm Wm. Mowry & Co. claimed to be seised of an absolute, indefeasible estate of inheritance in fee simple of and in the said premises, with the appurtenances, and of and in the privilege of draining water from said pond for any and every use and purpose they may deem proper, either for manufacturing, milling or otherwise, in the

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following proportions, viz. Wm. Mowry, one-sixth ; John Gale, one-third ; Townsend McCoun, one-third, and Samuel McCoun, one-sixth." In September, 1822, Samuel Gale purchased John Gale's part at a marshal's sale, on an execution against John. January 1st, 1825, Bethel Mather conveyed to W. Mowry, one-sixth, to T. McCoun one-third, to S. McCoun one-sixth, to Samuel Gale one-third of over 3 acres of land on which were a grist mill, saw mill and carding machine, with all the tools, utensils and machinery used about the same, and certain water power ; by 4 separate deeds, one to each.

On the 29th day of January, 1825, the two McCouns, S. Gale and W. Mowry entered into a stipulation or agreement under seal, in which they recited the fact of the last purchase, and that they had received deeds of their respective shares and proportions, to which and other papers reference was made, and then added as follows : " Now therefore to the end that the objects and intentions of the parties may more fully now and hereafter be understood, we hereby mutually and severally covenant and agree with each other, for ourselves, our heirs, executors, administrators and assigns, that we will hold the afore-said late purchased lands, mills, water privileges and appurtenances, and also the buildings, water privileges and lands called the old cotton factory, situate on the land so lately purchased, but heretofore and now owned by us jointly in common for the use, benefit, interest and accommodation of our said cotton manufacturing property and works ; and it is agreed that we give no preference of water privileges to said mill property or cotton factory, both works being on one dam, are equal as to water privileges, and that we will not individually or severally use, let or lease, sell or convey our share or interest in the said late purchased premises and privileges separate and unconnected with our respective shares and interest in said cotton manufacturing property and interest. Nothing herein contained is meant or intended to hinder or prohibit the said proprietors, or either of them, from selling or conveying the whole or any part of their joint shares of said cotton manufacturing property and

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said last purchased mill property, joint and connected, but not otherwise."

On the 18th of November, 1825, Wm. Mowry conveyed five-sixths of another parcel of land, containing between two and three acres, adjoining the parcel of 14 acres, to T. McCoun two-sixths, to S. Gale two-sixths, and to S. McCoun one-sixth. On the 25th March, 1830, Samuel McCoun died, leaving his share of this property to his son John T. McCoun. May 4th, 1830, Samuel Gale conveyed his interest to John Gale. On the 23d of December, 1834, John T. McCoun conveyed his interest to Wm. H. Mowry and Henry Holmes by two deeds.

On the 21st September, 1834, Townsend McCoun died, leaving a widow and one child, Mrs. Phebe Buckley, who was his sole heir at law. By his will he directed, first that his debts should be paid by his executors thereafter made; second, he gave a house and lot to his wife during life, also his furniture to his wife, also an annuity of \$1500, which he expressly charged upon certain lands and tenements which he specified as thereafter devised in trust to his executors and in lieu of dower; third, he gave certain real estate to his daughter in fee. Also other real estate for life, remainder to her children living at his death. Also after the death of his wife, an annuity of \$750 during life to her sole and separate use, and made this a charge upon his real estate devised in trust to his executors; fourth, he devised to his executors by name, not including his wife, several parcels of real estate and certain bank stock, subject to and charged with the payment of said annuities to his wife and daughter, and in trust to pay the same and to invest the balance to accumulate, &c. for the children of his daughter, and to make an equitable division to be paid as they became of age, &c. and any portion of real estate set off to a child, to be liable for a fair proportion of the annuities, &c. with power to sell in the discretion of the trustees, subject to the annuities, &c.; fifth, he devised his lot and store in Troy, to his grandsons, sons of his daughter, born and to be born; sixth, he disposed of a farm in Orange county, the use to D. so long as she occupied it, with remainder to his daughter in fee; seventh,

named

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he gave certain legacies to the children of Samuel McCoun; eighth, a legacy, to his sister, payable in one year after his death. And the ninth clause of the will was as follows: "All the rest and residue of my estate and effects, real and personal, not herein before otherwise effectually disposed of, (after payment of my debts and legacies, funeral expenses and other charges herein authorized,) I do give, devise and bequeath unto my said daughter, Phebe Buckley, her heirs and assigns forever." Tenth, he made his wife and four others, his executrix and executors. The daughter, Phebe Buckley, died March 15, 1838, leaving six children made defendants in this cause, all then being under age but one. Phinehas H. Buckley, her husband, took out letters of administration upon her estate. After the death of Townsend McCoun, Phinehas H. Buckley became a member of the firm of Mowry & Co. and so continued until the 12th day of August, 1845, when he conveyed all his interest in all this property and his interest in the copartnership, to the plaintiff John L. Buckley, his brother, for the consideration expressed in the deed of \$10,000. It appeared that Phinehas had become insolvent, and that his indebtedness to the plaintiff, which was the consideration of the conveyance, was pre-existing. Wm. Mowry died in March, 1845, and devised all his "right, being an undivided sixth part of all the estate real and personal, stock in trade and debts due, of, in and to the firm of Wm. Mowry & Co. called the Washington Cotton Factory," &c. to his daughter Caroline Holmes, who was the wife of the defendant Henry Holmes. John Gale died in September, 1846, leaving a wife and five children. He left a will of which the following is a copy.

"In the name of God, Amen. I John Gale, of the town of Greenwich, in the county of Washington and state of New-York, being of sound mind and memory, do make and publish this my last will and testament in manner following, viz. I order and direct my just debts and funeral charges to be paid. I give and devise to my beloved wife Remember Mary Gale, the use and enjoyment and the rents and profits of my homestead farm, unless it should be deemed advisable by my executors and for the

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benefit of the estate as well as for her interest to sell it, and in that case I authorize my executors to sell and convey the same and invest the same proceeds at interest, either in bonds and mortgages or public stocks of this state or the United States, the interest to be paid annually to my wife during her life. She is to have the use of all the household furniture, and at her decease to be equally divided between my four daughters or their heirs. I also direct my executors, after my debts are all paid, to pay my wife from dividends made from the cotton factory, if made to that amount, two hundred dollars annually. And I further direct that my wife shall be furnished with the bread-stuff she may require for family use from my mill in Easton, and this be considered a lien on said mill. I further direct, (should) my wife require further support, the executors to pay her the one half of what may be considered a fair rent of my brick store in the mill lot, which building I own independent of the original joint purchase.

I direct my executors to pay William Gale and Sarah D. Gale one thousand dollars each, and Caroline M. Townsend three hundred, she having received up to April 9th, 1840, seven hundred dollars; all sums since received, if any, to be deducted. My daughter Elizabeth has already received one thousand. The executors are directed to pay Juliana Gale, Sarah D. Gale and Caroline M. Townsend the sums thus above directed to be paid to them from the first moneys collected after paying all my debts. In the mean time they must be furnished with such aid as may be necessary to render them comfortable until the various sums can be raised to pay the full amount as directed. I direct my executors, as soon as my debts are all paid and any portion of my real estate can be sold without sacrifice, to pay over to each of my four daughters, Elizabeth, Juliana, Caroline M. and Sarah D., two thousand dollars. The executors are directed to invest the several sums of two thousand dollars each either in stock of the United States or of the state of New-York, or on bond and mortgage or valuable real estate, the interest to be paid over to each one annually; and at the decease of either of the daughters without heirs, the interest in the sums thus bequeathed to be

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equally divided between the survivors or their heirs. Elizabeth is to receive the interest during her life, and the principal to be equally divided between her children at her decease. I give and bequeath to my son Frederick A. Gale, my equal undivided half part of the mills, buildings and land, with all water privileges appertaining thereto, on the east side of Battenkill in the town of Easton, upon conditions, viz. : the said F. A. Gale is to take possession of the above described premises, to superintend and manage the same prudently, and the net revenue arising therefrom, or from any portion of my real and personal estate, shall be appropriated to the extinguishment of the debts due from my estate at the time of my decease. When the debts are all paid F. A. Gale is to come into immediate possession of the mill property as above described. The brick building now occupied as a store is owned by me independent of the original purchase of the mill lot which I also include in the devise to the said F. A. Gale, subject to the conditions following, viz. should any circumstances occur which would render it necessary that either my wife or daughter should receive aid, through misfortune or untoward causes, such a portion of the rent shall be paid as directed in my second section of this will. 6th. When the debts are all paid or arranged, with the legacies, I direct that my step-son Amander B. Sherman, one of my executors, shall be paid out of my estate four hundred dollars, in addition to the payment of a certain note given him some years past for six hundred dollars ; and while he remains unmarried he may board in the family, free from expense. My property consists mostly in real estate. My directions and advice to my executors are to exercise sound discretion in the management ; to sell such portions, when fair prices can be obtained, but not suffer yourselves to be driven into a sale of any part to disadvantage by any of the heirs, but at the same time they must be assisted to an equal share of any surplus revenue until a final close can be made and the devises are all paid on a final settlement. Should there be a deficit to meet all the bequests, an equal deduction is to be made from each. I do hereby nominate and appoint my step-son Amander B. Sherman, with my son Frederick A. Gale

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and Ezra Thompson Gale, executors of this my last will and testament; and I hereby expressly revoke all and every former wills by me made. In case of the absence or refusal to serve of either of my executors, I hereby authorize the remaining executor or executors to execute any of the powers conferred by this will."

The plaintiff claimed as assignee of purchaser from Phinehas H. Buckley.

At the time of filing the bill, four parcels of this property, a wagon shop, pail factory, blacksmith's shop, dry house, and another parcel, had been leased for years, under which leases the occupants then held. The cotton factory, weaver's shop, grist mill and saw mill, &c. were not leased.

The answers of the children of Phebe Buckley admitted that Phinehas Buckley entered into possession of the property as a member of the firm, and acted as such and received dividends, but that he avowed he was a tenant for life only.

It appeared by some of the annual settlements given in evidence, that the purchase money paid for the lands conveyed by Mather and wife was paid from the profits of the firm, \$2000 in 1825, nearly \$3000 in 1826, more than \$2500 in 1827—the principal being about 7000 dollars. A grist mill was built or generally repaired in 1827. In 1830 the company purchased about \$400 worth of machinery. In 1831 and 1832 they expended nearly \$9000 for mills, and over \$1000 in repairing dam, &c. and received over \$4500 from insurance companies. The difference was paid out of partnership funds. In 1833 they purchased one house and built another at an expense of \$600, and also purchased and repaired machinery, and the total expense that year was over \$1500, paid by the company. During the time Phinehas H. Buckley was a partner, they expended for machinery and repairs about \$14,000, of which the machinery was the greater part, and about \$2500 in building—and among other erections a wagon shop. The saw mill was rebuilt about 1839. The earnings during the same period were over \$20,000. The expenditures for the repairs, &c. since the plaintiff had been a partner were not given, except for the year ending April, 1846;

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the repairs, new machinery and building being nearly \$1400 that year, and the net earnings nearly \$6,500. The bill was taken as confessed against all the defendants, except the children of Mrs. Phebe Buckley.

T. C. T. Buckley, for the plaintiff.

Walter Rutherford, for the heirs of Mrs. Buckley.

HAND, J. Several important questions have been argued in this case. It is contended on the part of the plaintiff that most of this property, from its very nature, is personalty, and that were it otherwise, it must all be so considered, in equity, because there is an equitable conversion.

What shall be considered fixtures and as such pass with the realty, is often a vexed question, and is not always easy of determination. Different rules prevail under different circumstances, depending upon the relation of the parties and the nature and use of the property. One rule obtains between heir and executor, vendor and vendee, mortgagor and mortgagee; another between landlord and tenant, and that again is affected by the occupation of the tenant, whether it be trade or agriculture. Another between the personal representatives of the tenant for life and the remainderman or reversioner. Indeed as to machinery, the motive power has been deemed worthy of consideration. Hardly any two decisions can be said to be precisely alike; each generally having some distinguishing peculiarity. The application of any common principle is therefore very difficult. The old law favored the realty; but that has been much relaxed in favor of trade.

Our revised statutes declare that things annexed to the freehold, or to any building for the purpose of trade or manufactures, and not fixed into the wall of a house so as to be essential to its support, shall be deemed assets; and go to the executor or administrator, to be applied and distributed as part of the personal estate of the testator or intestate. (2 R. S. 82, § 6, *subd.* 4.) "Things annexed to the freehold, or to any building, shall not

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go to the executor, but shall descend with the freehold to the heirs or devisees, except such fixtures as are mentioned" in the above clause. (2 R. S. 83, § 7.) And by section 9 "the right of an heir to any property not enumerated in the preceding 6th section, which by the common law would descend to him, shall not be impaired by the general terms of that section." The 6th section has nine subdivisions. The above extract from it is the fourth, and the other eight make very little if any change in the law. If there is any meaning in the 8th section, I think it is intended to confine the 6th to a strict construction. The revisers reported ten subdivisions, two of which referred to fixtures, and in the remarks accompanying this section it might be supposed that they proposed, in all cases of trade fixtures, to put the executor on a footing with a tenant during his term. (*Rev. Notes*, 3 R. S. 639, 2d ed.) And the chancellor seems to have supposed this was their intention. (10 *Paige*, 163.) The legislature struck out one of the subdivisions, being that part not relating to fixtures for the purposes of trade and manufacture, which latter they passed as reported by the revisers. But whatever might have been the intention of the revisers, the question is, what is the true construction of the statute? The 6th section appears to be a mere enumeration; and if its 4th subdivision is to be construed upon the rule of *nascitur a sociis*, there would be no difficulty, for the other subdivisions are a mere enumeration of personal effects.

It may be proper to remark that so much of this property as was purely personal, on the death of Townsend McCoun, would go to his executors, and not specifically to the residuary legatee. They alone had the title in law. (4 *Bac. Abr.* 444. *Jenkins v. Frejer*, 4 *Paige*, 47. *Wodin v. Bagley*, 13 *Wend.* 453. *Beecher v. Crouse*, 19 *Id.* 306. *Edgerton's Adm'rs v. Concklin*, 25 *Id.* 236. 2 R. S. 81, § 60.) But our statute, after payment of debts, &c. permits the distributees to take the remaining personalty by order of the surrogate. (2 R. S. 95, § 72.) And if that were necessary in this case, after the long possession by the Buckleys, perhaps that might be presumed. In that case of course it would go to the husband of the residuary

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legatee, absolutely. Formerly whatever was affixed to the realty undoubtedly by the mere act of annexation, immediately became parcel of the freehold itself. *Quicquid plantatur solo, solo cedit.* (*Lee v. Risdin*, 7 Taunt. 190. *Herlakenden's case*, 4 Co. 63.) Amos & Ferrard, in their treatise on the *Law of Fixtures*, say, that in order to constitute a fixture, it is necessary that the article should be let into the land, or united to it, or to substances previously united therewith. (*Law of Fix.* 2.) This was sufficient to make it realty, within the old rule. And every case of a right to sever a fixture from the freehold is an exception. (*Id.* 9.) But exceptions began to obtain at least nearly 350 years ago, in favor of trade. In a case in the year book, 20 Hen. 7, 13, a lessee for years was allowed to remove a frame fixed to the freehold by mortar and annexed to the wall by him for the purpose of his trade. (*Law of Fix.* 18.) The same principle was recognized in *Poole's case*, which was a suit by a lessee for years, against a sheriff for removing the vats, &c. of a soap boiler, his under-tenant. This was decided about 150 years since. (1 Salk. 368. *S. C. Holt*, 65.) It has been decided that fixtures that may be removed by the tenant, may be taken on a fi. fa. (*Id.* *Pitt v. Shaw*, 4 B. & A. 206. *Law of Fix.* 261. 2 M. & W. 459.) But not if affixed to the freehold of the debtor. (*Winne v. Ingilby*, 5 B. & Ald. 625.) Nor can they be recovered in trover until severed; for until severed they are parcel of the freehold. (*MacIntosh v. Trotter*, 3 M. & Welsb. 184. *Lee v. Risdin*, 7 Taunt. 188.) In *Ex parte Quincy*, (1 Atk. 477,) Ld. Hardwicke is made to say that the utensils did not pass on the sale of a brew house unless a consideration was paid or a value set upon them. Utensils is used here, probably, in its limited sense. And that case was between one claiming under the vendee (or his mortgagee) the utensils of a brew house, who had a lease of it, and a subsequent mortgagee of the brew house. The lord chancellor, in relation to the right of fixtures remarks, as between heir and executor, "the freehold descending on the heir, the executor can not enter to take away fixtures without being a trespasser."

Lawton v. Lawton was a question between the executor of a

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tenant for life and the remainderman, as to the right to a fire engine set up by the tenant for the benefit of a colliery, and was decided in favor of the executor. (3 *Atk.* 13.) The claim was prosecuted by a creditor of the tenant, who introduced proof of the custom to remove them, and that they were constructed and enclosed with reference to such removal. And Lord Hardwicke said it did not appear in evidence that in its nature it was a personal movable chattel, taken either in part or in gross before it was put up. He adverts to the rule, but says it has been relaxed, but chiefly between landlord and tenant, between whom the case would be very clear, and not so frequently between ancestor and heir at law or tenant for life and remainderman. He added that it was not a case between ancestor and heir, but an intermediate case between a tenant for life and a remainderman; which he thought came nearer the case of a common tenant. He finally decided in favor of the executor, principally to encourage trade, for public benefit. He further said the court would construe the fund assets, to the utmost in favor of creditors. Some of the strongest cases of severance were in favor of creditors. (*Lawton v. Lawton*, *supra*. *Law of Fict.* 261. *Farrar v. Chauffetete*, 5 *Den.* 527. *Pitt v. Shaw*, *supra*. *Raymond v. White*, 7 *Cowen*, 319. *Sturges v. Warren*, 11 *Vt. Rep.* 433.) Yet Richardson, J. in *Steward v. Lombe*, thought a wind mill could not be taken in execution. (1 *B. & B.* 506.) In a note to the case of *Lawton v. Lawton*, it appears that certain other engines fixed upon salt works by the father of the tenant for life were decreed not to be personal estate of the testator. This case was decided in 1745.

About forty years after this, *Lawton v. Salmon* was decided. (1 *H. Black.* 259, *note*. *S. C.* 3 *Atk.* 16, *n.*) This was trover in the King's Bench, by an executor against the tenant of the heir, for salt pans used in salt works, and placed there by the testator, who was seised in fee. They might be removed without injuring the buildings, and were not joined to the walls, but were fixed with mortar to the brick floor, with furnaces under them, and the workmen could walk around them within the building. They could be removed without injuring the building. *Ld. Mansfield*

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gave the opinion of the court, that the salt pans belonged to the heir. As between heir and executor he could find no case except that of the cider mill, (before Ld. C. B. Comyns, which he seems to doubt,) of a relaxation of the rule. He rather admitted that the case of a tenant for life and remainderman was more analogous to that of landlord and tenant. And so Ld. Ellenborough intimates in *Elwes v. Maw*, (3 *East*, 51.) This decision in *Lawton v. Salmon* removes the doubt thrown over the rights of the heir by an obiter remark of Ld. Hardwicke in *Lawton v. Lawton*, and accords with what he said in relation to those rights in *Ex parte Quincy*, (*supra*), and in *Dudley v. Wade*, (*Amb.* 113.) It should be remarked that *Dudley v. Wade*, like *Lawton v. Lawton*, was also a claim by the executor of a tenant for life or in tail. So the question between heir and executor, as in *Lawton v. Salmon*, did not arise. And Ld. Ellenborough, as late as 1802, in *Elwes v. Maw*, after stating that questions in respect to fixtures ordinarily arise between three descriptions of persons, says, "as between heir and executor the rule obtains with the most rigor in favor of the inheritance and against the right to disannex therefrom, and to consider as personal any thing which has been affixed thereto." He adds, that between the executors of a tenant for life or in tail and the remainderman or reversioner, the right to fixtures is considered more favorable for executors than in the preceding case between heir and executor. After speaking of the relaxation between landlord and tenant, &c. he says, "the general rule on this subject, is that which obtains in the first mentioned case, i. e. between heir and executor; and that rule [as found in authorities which he names] is that where a lessee having annexed any thing to the freehold during his term, afterwards take it away, it is waste." The better opinion seems to be that the case of the cider mill before Ld. Ch. Baron Comyns rested upon custom. (*Note to Lawton v. Lawton*, 3 *Atk.* 14. *Lawton v. Salmon*, *supra.* *Law of Fix.* 144. And usage controlled the case of *Culling v. Tatnall*, (*Bull. N. P.* 14. *Law of Fix.* 40.) And in *Wansboro v. Maton* a custom was shown to remove such barns; and beside, in that case the court decided that it was not

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attached to the freehold in any way. (4 A. & E. 884.) And so in *Rex v. Otly*, the case of the wind mill, (1 B. & Ad. 161.)

I do not find any relaxation of the rule between heir and executor, in this state. (*Hermance v. Vernoy* went off on another point. (6 John. 5.) So did *Cresson v. Stout*, (17 John. 116.) In that case there was a plain answer to the defense, without reference to the question of fixtures. And had there not been, the mortgage by the owner conveyed every thing to the plaintiffs except the frames for spinning flax, and those were not fastened to the floor or walls. And besides, Mr. J. Platt puts his opinion upon the authorities cited in *Elwes v. Maw*. No reference is made by him to the distinction between the rights of owner in fee and a tenant. *Holmes v. Tremper*, (20 John. 29,) was between landlord and tenant for years. No reference was made to the fact that the case of the cider mill, and others, were supposed to have turned upon usage. But there, the rule between heir and executor was recognized. *Miller v. Plumb*, (6 Cowen, 665, in 1827,) was trover by a vendor of the premises on which an ashery stood, for kettles, troughs and leaches, and 500 feet of boards, belonging to the ashery. Two potash kettles were set in an arch of mason work with a chimney; the arches on a platform, but not fastened to the building. The troughs were sunk in the ground. The boards were for an upper floor, and part of the kettles were not set in any way. The lessee of the grantee had taken possession. The plaintiff recovered, and the defendant, on a writ of error, reversed the judgment. Woodworth, J. in delivering the opinion of the court said, "the rule appears to be well established: whatever is affixed to the freehold becomes part of it and can not be removed. Exceptions have been admitted between landlord and tenant; between tenant for life or in tail and the reversioner; yet the rule holds between heir and executor." And he approves the remark of Lord Ellenborough in *Elwes v. Maw*, that "the rule obtains with the utmost rigor in favor of the inheritance and against the right to disannex therefrom and to consider as a personal chattel any thing which has been affixed thereto:" and said that the cases of heir and executor, and vendor and vendee, were different

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from those of tenant for life and reversioner, and landlord and tenant. "The ancestor or vendor has the absolute control, not only of the land, but of the improvements. The heir and executor are both representatives of the ancestor; the vendor has an election to sell or not to sell the inheritance." He also repeated Lord Mansfield's remark in *Lawton v. Salmon*, (*supra*), that "I can not find that between heir and executor there has been any relaxation of this sort, except in the case of the cider mill, which is not printed at large." He however thought there had been a conversion of some of the articles which were not annexed to the freehold. I suppose these were the kettles not set in any way, and the boards.

In *Walker v. Sherman*, Mr. J. Cowen took an elaborate view of most of the leading cases. (20 *Wend.* 658.) Had that been a case of heir and executor I should have thought it unnecessary to re-examine the question. It was a case of partition between tenants in common, who Judge Cowen thought stood upon the same ground as grantor and grantee, where we have seen the principle between heir and executor before our statute, prevailed. The property was a woolen factory, a house, barn and 20 acres of land. In making partition the court treated two double carding machines, a picking machine, spinning machine, looms, &c. as personal property. On the hearing before the commissioners the plaintiff's counsel admitted that all the machinery affixed to the freehold was real estate, but denied that machinery which was loose and movable was so. The articles in question, as stated by the plaintiff's counsel, were in the factory, but not in any manner affixed or fastened to the buildings or lands. The commissioners acted upon this distinction. Judge Cowen thought from the affidavits that the machinery treated as personalty by the commissioners "was such only as was movable and in no way physically attached to the factory or land, though it had been used for several years as belonging to the factory, and was material to its performance in certain departments of its work, as the machinery which was actually affixed. Did the commissioners err in disregarding the movable machine?" The court held they did not. In this case, then it was said, that whatever

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was affixed to the freehold was real estate, and that part of the machinery which was "in no way physically attached to the factory or land," was not. And that by a deed "conveying the freehold, whether by metes and bounds of a plantation, farm or lot &c., or in terms denoting a mill or factory, nothing of a nature personal in itself will pass, unless it be brought within the denomination of a fixture by being in some way permanently, at least habitually, attached to the land or some building upon it. It need not be constantly fastened. It need not be so fixed, that detaching will disturb the earth or rend any part of the building. I am not prepared to deny that a machine movable in itself, would become a fixture from being connected in its operation by bands, or in any other way, with the permanent machinery, though it might be detached and restored to its ordinary place, as easily as the chain in *Farrar v. Stackpole*. I think it would be a fixture notwithstanding." And again; "It is not to be denied that there are strong *dicta*, and perhaps we may add the principle of several adjudicated exceptions, upon which we might with great plausibility declare the machines in question so essential to the purposes of the manufactory, although entirely dissociated with the freehold, a fit subject for entering into the list of constructive fixtures. The general importance of the rule, however, which goes upon corporeal annexation, is so great, that more evil will result from frittering it away by exceptions, than can arise from the hardship of adhering to it in particular cases." In this opinion he suggests that, as between heir and executor the revised statutes may have partially altered the rule. And he adds, "taken literally, it would strip the heir of the wheels, gearing, and all the other machinery fixed in the ordinary way to a mill or manufactory inherited by heirs." But this point was not argued; the case, as we have seen, being between tenants in common. This decision was in 1839; and in 1843, Chancellor Walworth decided *House v. House*, where this statute came directly under examination. (10 *Paige*, 158.) The decedent died seised of a grist mill and flouring mill; and it was claimed that the machinery and apparatus which was necessary for manufacturing flour in such mill, and which were not fixed

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into the wall so as to be essential to its support, was personalty and belonged to the administrators. The chancellor thought it impossible in three lines to define what was part of the freehold itself and what were mere fixtures or things annexed to the freehold for the purposes of trade or manufacture, and that we must still go back to the common law, and to the decisions of the courts, for the purpose of ascertaining what is a substantial part of the freehold, and what is a mere fixture or thing annexed to the freehold. That we must also resort to the same sources of information to ascertain what is to be considered a part of the building, and what is in its nature mere personal property, and only annexed to such building temporarily for the purpose of trade and manufacture. And that it could not have been the intention of the legislature to allow the personal representatives of the owner in fee to strip a grist mill of the water wheels, mill stones, bolting apparatus and running gear, leaving to the heir the mere sides or walls of the building, with its floors, partitions and roof. He said these fixtures were not only convenient, but essential to the enjoyment of the inheritance; taking the same ground as Lord Mansfield, in *Lawton v. Salmon*. He decided that the mills and all the apparatus went to the heir; explicitly following the old rule. (And see *Le Roy v. Platt*, 4 Paige, 82; 2 Kent, 346, and note, 5th ed.) In *Cook v. The Champlain Trans. Co.* the erections were by tenants. (1 Den. 31.) In the case of *Farrar v. Chauffetete*, (5 Denio, 627, in 1848,) it was held that a horse power and machinery for making pumps on the farm of the owner, the horse power being a horizontal wheel in the basement of a building, which turned on an iron pivot driven into the center of two large sticks of timber crossing each other at right angles and embedded in the ground, and the rest of the machinery fixed in the building partly by timbers embedded in the earth, and partly by being fastened to the frame and floors by bolts, screws, nuts and cleats, and connected with the horse power by belts and gearing, were not fixtures passing with the freehold. It was found however that it was not affixed to the building, except so as to be detached from it without drawing nails or breaking bolts, pins or other things, and that they

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were put up after the building was built, and for manufacturing purposes, and in such a manner as to permit them to be taken out at pleasure, without injuring the building. The farm was sold by the sheriff, and after a conveyance, the sheriff sold this horse power and machinery as personal property on another execution, and the suit was a trial of the validity of these titles. The judge at the circuit told the jury that this was personal property, if it could be removed without drawing nails or injuring the building. Whittlesey, J. delivered the opinion of the court, and seemed to lay much stress on the kind of motive power used; intimating that had the machine been driven by hydraulic, instead of movable power, the decision would have been different. He also relied upon the statute in relation to assets, as a legislative opinion; and upon the fact that the timbers were embedded in the ground and not fixed to the building; and that the building was not originally erected for that purpose. The opinion is cautiously expressed, and the case evidently stands upon different and narrower grounds than *Walker v. Sherman*. There it was said that it need not be so fixed as to disturb the earth or rend any part of the building. And in *Lawton v. Salmon*, and *Miller v. Plumb*, the articles rested upon the earth, or upon mason work resting upon the earth. All admit that a rail fence on a farm, though not let into, or in any way fastened to, the land, is part of the realty. (20 *Wend.* 646. 2 *Hill*, 142.)

As between tenant for life and remainderman or reversioner, the rule in favor of the realty is, as we have seen, somewhat relaxed. And I am inclined to think that a tenant for life who erects a fixture for the purposes of trade or manufacture, has an equal right, in respect to their removal, with a tenant for years, (*Law of Fix.* 117,) though the cases have perhaps not generally gone so far. But this only applies to those fixtures put up by the tenant. Thus in the leading case against the remainderman, (*Lawton v. Lawton*, *supra*,) engines in a colliery, put up by the father of the tenant for life, were considered realty. (3 *Atk.* 16. And see the case of *Tarrant v. Thompson*, 2 *D. & R.* 1. *S.C.* 5 *B. & Ald.* 826.) In that case, where a windmill and machinery had been leased, Holroyd, J. said, "the machinery was let

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together with the mill and was part of the mill. It was part of the inheritance until the demise was made. When the demise took place, it continued part of the inheritance of the landlord, and part of a chattel real in the hands of the tenant in possession." (*And see Miller v. Plumb, supra.*)

This review of the cases is sufficient to show what the law was before. And we have seen what construction Chancellor Walworth has put upon our statute. It is difficult to see how any other can be given without doing incalculable mischief. This view of the law does no injury to creditors; for the real, as well as personal, property of the decedent is held liable for all debts. But, if fixing into the wall of a house so as to be necessary to the support of that wall, is the test between heir and executor or administrator, then injury will be done to creditors by depreciation and loss, as well as to heirs. Take the case of a flouring mill erected for the purpose of manufacturing flour; the water wheels, gearing, mill stones and bolts, &c. must all come away, and the mill be substantially rebuilt. If a saw mill, the destruction would be as complete. If a forge, its heavy wheels and massive beams and hammers, anvil and block, touch no walls, and three-fourths of the works must be removed. A rolling mill, with its ponderous machinery, if possible, suffers more. A large portion of the parts removed would be quite valueless elsewhere. The greatest care and prudence, probably, would not prevent a sacrifice of, at least, fifty per cent. Language should be very explicit and imperative, before it receives an interpretation so disastrous in its consequences. Toller, to whom the revisers refer, cites no case that maintains such doctrine. (*Toller*, 199. 11 *Vin.* 167.) That rule was never applicable between the real and personal representatives of the owner in fee. If we read "things annexed to the freehold" for trade, &c. without reference to the remainder of the paragraph, and consider a building as distinct from the freehold, perhaps the administrator may take from the heir, buildings. As between landlord and tenant for years, it has been held the tenant could remove the building itself erected for the purposes of trade. (*Van Ness v. Pacard*, 2 *Peters*, 137.) The revisers say, the 8th section was inserted

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for greater caution. It saves the right of the heir to property not enumerated in the 6th section, and which would descend to him by the common law, from being impaired by the general terms of that section. This, if it means any thing, limits the section strictly to the enumeration. The 7th, which was not reported by the revisers, taken literally, if we adopt the same dividing line, would give to the heir every thing annexed to the freehold not included in the 4th subdivision, as a mirror, &c. fastened to the wall, (unless adjudged, notwithstanding this phraseology, to be furniture under the 9th subdivision.) And a tenant for years, or for life, or an administrator, could remove nothing in any way annexed to the freehold, or fixed to the wall of a building, unless for trade or manufacture.

It seems to me the legislature never intended these consequences. This fourth subdivision, probably, applies to those cases only, where the interests of the late occupant and the present owner are adverse, or at least distinct; as where the present owner is not the real representative of the decedent. The preceding parts of the section refer to such cases. And the word "things," which has been held to refer to personalty, (*Cook v. Oakley*, 1 P. Wms. 302,) may here be restrained to articles *ejusdem generis*. Even where the decedent had a lease for years, or an estate for the life of another, or where the lands are devised to an executor for a term of years, to pay debts, it is very proper that all the machinery and fixtures should be set forth in the inventory.

Technically, every thing that has been completely annexed to the freehold by the owner in fee, becomes, *ipso facto*, a part of the freehold itself. And in *Winne v. Ingilby*, (*supra*), and *Miller v. Plumb*, (*supra*), this absolute ownership is fully appreciated. It seems to me that the rule in this state, as between grantor and grantee, vendor and vendee, mortgagor and mortgagee, and heir and personal representative of the deceased, still is, that whatever is annexed or affixed to the freehold, by being let into the soil or annexed to it, or to some erection upon it, to be habitually used there, particularly, if for the purpose of enjoying the realty or some profit therefrom, is a part of the freehold.

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In the principal case, then, all the erections, including the dams, water wheels and gearing, and machinery, fastened to the ground or buildings, were *prima facie*, a part of the realty held by the tenants in common in the lifetime of Townsend McCoun, and so remained after his death. Thus far we have treated the case as between executor (or administrator) and heir. But this is a case of a devise of the realty. There is no doubt but that the owner of land may devise the same with all the fixtures as realty. The statute has not deprived him of this right. And where he devises land, upon which are water power and machinery propelled thereby; at least where the right of no third person intervenes, it is by no means clear, that fixtures will not pass. (*Law of Fix. by Amos & Ferrard*, 189. And see *Lushington v. Sewell*, 1 Sim. 435.) Emblements would, by the common law. (9 Vin. 372. *Ram on Assets*, 190, and cases there cited.)

Perhaps our statute has altered this rule; but devisees are not mentioned in the sixth and eighth sections. The seventh uses language implying that fixtures may *descend* to the devisee, but strictly a devisee takes by purchase. (*Ram on Wills*, 18, 20, 110.) If such is the legal intent of the will, *Walker v. Sherman* applies. But I do not think it necessary to rest the case upon that ground.

The plaintiff claims as grantee or vendee of Phinehas H. Buckley, the husband of Phebe Buckley. If this property was real estate, and Phinehas was tenant by the curtesy, he had the same right to the fixtures annexed to the land of his wife, as an ordinary tenant for life. (*Law of Fix.* 126.) A tenant by the curtesy was always liable for waste. (2 Saund. R. 252, n. 7. 2 Bl. 283.) Though tenants for life were not punishable at common law, but were by statute. (1 Cruise, Dig. 69. 2 Bl. 283.) It has been held that the assignee of a tenant by the curtesy, was not liable. (*Bates v. Shræder*, 13 John. 260.) But now the assignee is liable. (2 R. S. 334, § 1.) The interest of the plaintiff, as having an estate *pur auter vie*, on his death perhaps under our statute, would become a chattel real. (1 R. S. 722, § 6.) But however that may be, if Phinehas H.

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Buckley possessed this property as tenant by the curtesy, the plaintiff, I think, has all the rights of a tenant for life. (*Law of Fiz.* 126.) And of course, as to erections placed upon the premises by the Buckleys for the purposes of trade, the question is substantially between a tenant for life and remainderman.

But admitting this to be realty, it is strenuously urged that there was never such seisin of the wife as is requisite to consummate this estate. This objection I think not well founded. Phineas H. Buckley became partner and received a proportionate share of the profits, immediately after Townsend McCoun's death; and until long after the death of his wife. And again, if this was real estate in the hands of the partners, they were tenants in common, and the seisin of one tenant in common will be considered the seisin of the other, for this purpose. (*Clancy on Rights of Married Women*, 181. 7 *Vin.* 150. 2 *Cru. Dig.* 551, 560. *De Grey v. Richardson*, 3 *Atk.* 469. *Ellsworth v. Cook*, 8 *Paige*, 646.)

At common law a tenant by the curtesy could not have a writ of partition. (*Allnatt on Partition*, 34.) But no such objection now exists, if it ever did in equity. Phineas H. Buckley, or his grantee, has an estate for life, within the statute. (2 *R. S.* 317, § 1. And see 1 *Story's Eq. Jur.* § 665; *Wotten v. Copeland*, 7 *John. Ch.* 140.)

Another ground has been warmly contested in this case. It is said by the plaintiff, that this is partnership property, and consequently should be considered personal estate. In that case, the legal estate would be in the heir or devisee, though equity might treat it as personal. (*Coll. on Part.* § 133, *Perkins' ed. Delmonico v. Guillaume*, 2 *Sandf. Ch. R.* 366.)

The authorities in England upon this point are very conflicting. An elaborate examination of them will be found in the recent edition of *Collyer on Partnership* by Mr. Perkins. That writer and Mr. Bissett in his late work on the same subject found it difficult to reconcile the decisions. Mr. Cary hardly pretends to give an opinion; though he says "opinions, however, preponderate in favor of its being treated as personal estate."

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(*Cary on Partnership*, 27.) In *Lake v. Craddock*, (3 P. Wms. 158,) before Ld. Ch. King, in 1732, five persons purchased land for £5000 and went on for several years trying to drain it, then Craddock abandoned the concern. The other four continued the work and also purchased other lands. After Craddock died one of the four filed a bill for account and division. The master of the rolls decided that the parties were tenants in common, and against survivorship. He also decided that the defendant, who was son and heir, and executor of Craddock deceased, should pay enough with interest, to make his father's share equal to the others in all the lands, and have an equal share, or in default of such payment, have nothing. The defendant appealed, and the decree was affirmed. In *Thornton v. Dixon*, (3 Bro. C. C. 199,) three persons owned land in fee and entered into copartnership as paper makers, and built upon the land. Three years after, they took four others into the firm, for 21 years, and by the deed of copartnership, the three first were to stand seised of the land in trust for the uses of the copartnership, in proportion to their several interests, and in case of a desire by one to sell, the others were first to have notice, so that they might buy. The time limited for the partnership expired, and they still continued business until one died. During the second copartnership they had purchased other lands for the better carrying on of their business. All the lands were used for the purposes of their trade. Thurlow, Ld. Ch. considered the land as realty; but said if there had been an agreement to value and sell, it would have been considered as personalty of the partnership.

Bell v. Phyn, (7 Ves. 453,) was decided in 1802, by Sir Wm. Grant. Three persons, merchants and partners, with another, purchased a plantation in New-Granada, and before the death of one of them, had nearly paid for it, out of partnership funds. All the accounts in relation to it were kept in the partnership books. One of the residuary legatees of a deceased partner, filed a bill, and it was held that the plantation was real estate. The master of the rolls said there was no occasion to call for it for any of the purposes of the partnership.

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Ripley v. Waterworth, decided the same year by Ld. Eldon, (7 *Ves.* 425,) and *Smith v. Smith*, by Ld. Loughborough, (5 *Ves.* 189,) turned upon contract; the deeds evincing an intention of the parties to have the property converted into personal estate.

Balmain v. Shore, decided in 1804 by Sir Wm. Grant, (9 *Ves.* 500,) also turned upon the articles of copartnership, and the recitals in the conveyances. It was held, that the firm had a right to the use of the property during its existence, and that, subject to this use the property was real estate. The property was purchased after the formation of the copartnership, and was a china and pot manufactory, the firm carrying on the business of potters. This case is hardly in consonance in all respects with *Ripley v. Waterworth*.

In *Randall v. Randall*, (7 *Sim.* 271,) decided in 1835, the Vice Chancellor, Sir Lancelot Shadwell, reviewed many of the authorities. Two brothers, one a land surveyor, and the other a grocer, became copartners in the business of farming. Soon after, they became partners, also, in the business of making malt; and again soon after that, in the manufacture of biscuit. The malting business continued about 13, and the biscuit making about 20 years. The farming business continued in all nearly thirty-five years, until the death of one of the brothers. When they began, they were tenants in common with others of property partly freehold and partly leasehold, consisting of a house, barn, lands, &c. their father's estate. There the farming and malting business were carried on, and the baking business there and on the separate land of one of them. They began in 1792, and in 1802, bought out one of their co-tenants with partnership funds. In 1803, they purchased and paid for another parcel in the same way, and in 1805, another; all of which were used for their farming and agricultural purposes. In 1808, certain allotments of land were made to them, which they improved with partnership funds, and they were used as the other property. In 1820, they purchased some other lots with partnership funds, which they let to tenants. It was held that these parcels were not personal estate.

Cookson v. Cookson, was decided by the same judge in 1837,

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(8 *Sim.* 529.) In that case Cookson the father, who was a bottle manufacturer, was seised of certain estates in fee. He formed a partnership with Cookson the younger for 24 years, and conveyed to him in fee nearly one-fifth of this real estate. After the partnership had continued about 15 years, the father conveyed another portion to the son, which made him owner in fee of nearly an equal undivided one-third of the whole. The consideration of these conveyances, as expressed, was love and affection. The conveyances also included an equal share of the trade, stock, capital and business of the firm. It was agreed that the hereditaments should be used as a manufactory for carrying on the trade, and should be considered as part of the joint stock of the business. And it was to be had, taken and enjoyed as part of the joint stock in the partnership business. And they did, for themselves and their respective heirs, &c. covenant with each other and their several heirs and executors, &c. "that the freehold hereditaments should at all times thereafter be held and occupied as partnership property, and be considered and treated as part of the joint stock of the partnership trade, according to the several shares and interests of the parties therein." And, if either partner should wish to sell, or if he should die without having bequeathed or assigned to a son or sons, then 20 days' notice should be given to the survivor, of such devise or death, who might purchase the interest of the other at such valuation as they had put to the shares at their last annual account, &c. If not purchased, it might be sold to others, who should be admitted partners. After the partnership had existed 24 years, they continued on about four years longer, as before, without new articles and until the death of the father. During the whole 28 years, they held and used this freehold property for the purposes of their trade alone; and its estimated value was entered in the books and accounts of the firm as part of the joint stock or capital, and was considered and treated, in all respects, as part of it. Over \$8000 were expended out of the funds of the partnership, in erecting new buildings, and making other improvements upon the premises. The bill was filed to have the interest of the elder Cookson in the freehold, declared stock in trade of the

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partnership, and that the eldest son had no interest as heir, and that the surviving partner had no right of pre-emption, and that the estate be sold, &c. In the course of the argument, the vice chancellor asked if there was any case where real estate had been declared personal, where the land was not purchased with partnership funds, nor was required to be sold for partnership purposes? In delivering his opinion, he considered the clause in relation to pre-emption, as not continuing after the first 24 years. He laid stress on the fact that it was not suggested, that when the partnership terminated, there was "any necessity for a sale of a part of the assets for the purpose of paying the partnership debts." Nor was the property purchased with partnership funds. He approved of the reasoning of Sir Wm. Grant in *Bell v. Phyn*, (*supra*), and decided there was no conversion.

If these cases declare the law, there has been no conversion in this case. But there are contrary decisions. *Ripley v. Waterworth*, we have noticed. It was decided in 1802 by *Ld. Eldon*; and turned upon the construction of the deed of partnership, which, it was held, was a conversion of the real estate out and out. *Leigh & Dalzell* put the case as one of contract of sale. (*Leigh & Dal. on Eq. Conv.* 21.) This case is said, by *Mr. Collyer*, to have paved the way for the modern doctrine and the leading case of *Ld. Eldon* favorable to equitable conversion in cases of partnership. (*Coll. on Part.* 72, *Perk. ed.* § 142.) But he says it was placed upon express agreement, and I think *Ld. Eldon* expressly put it upon that ground. There was a right of pre-emption, and one of the partners elected to purchase and did so. So the agreement to purchase was executed. The property was both freehold and leasehold; and was conveyed to trustees to the use of such persons as the partners should respectively appoint and, in default of appointment, to the use of the partner and to sell and pay partnership debts and divide or convey, &c.

The same chancellor is said to have gone further in *Townsend v. Devaynes*, (1 *Mont. on Part. App.* 96.) As reported in that work, he decided that real estate consisting in part of

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paper mills, purchased by paper makers, who were partners, and paid for out of partnership capital, and held for the uses of the partnership, was, on the death of one of the firm, and as between heir and executor, to be considered personal estate. But Mr. Jacob seems to think there was an agreement between the partners for a conversion of the property. (*See 1 Roper on Hus. and Wife*, 346, n. *Jac. ed. and the opinion of the V. Chan. in Randall v. Randall*, *supra*.) Mr. Bickersteth, in his argument in the case of *Philips v. Philips*, says, nothing existed of this case except a brief statement extracted from the pleadings; that there was no judgment in the case, and it was doubtful whether there was not an agreement, and that *Ld. Eldon* six years after, in *Crawshay v. Maule*, (1 *Swanst.* 521,) treated the point as unsettled. This last remark it seems, is warranted by the report of *Crawshay v. Maule*.

*Afterwards
Ld. Langdale*

Fereday v. Wightwick came on before Sir J. Leach, M. R. in 1829. (1 *Russ. & My.* 45; *S. C.* 1 *Taunt.* 250.) Six persons took a lease for years of certain mines, for the purpose of working them in partnership. One, who had been manager, assigned his shares by way of security for money advanced, and then became bankrupt, greatly indebted to the concern. The bill was filed by the other persons interested therein; prayer for sale of partnership property, and to have accounts taken and co-partnership dissolved and that the shares of the bankrupt be applied in payment of the debt to the partnership he had incurred in managing its affairs. The court so held. The master of the rolls is reported by *Tamlyn* to have said: "It is a principle that all property, whether real or personal, is subject to a sale, on a dissolution of the partnership. This is property acquired by the partnership for the purposes of the concern, and it is subject to all the debts of the partnership property, and to the debts of one partner to the other partners in respect of the partnership." By *Russell & Mylne*, that "the general principle is, that all property acquired for the purposes of trading concerns, whether it be of a personal or real nature, is to be considered as partnership property, and is to be first applied accordingly in satisfaction of the demands of the partnership."

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The same judge, in *Philips v. Philips*, (1 My. & K. 649, 1832,) went a step farther and said, with respect to the question, "whether the freehold and copyhold property purchased with partnership capital, and conveyed to the two partners and their heirs for the purposes of partnership trade, is to be considered as personal estate only for the payment of the partnership debts, or is generally to be considered, to the extent of a moiety, as personal estate of the deceased partner, I confess I have for some years, notwithstanding older authorities, considered it to be settled that all property, whatever might be its nature, purchased with partnership capital for the purposes of partnership trade, continued to be partnership capital, and to have, to every intent, the quality of personal estate; and in the case of *Fereday v. Wightwick*, I had no intention to confine the principle to the payment of partnership demands. Ld. Eldon has certainly, upon several occasions, expressed such an opinion; the case of *Townsend v. Devaynes*, is a clear decision to that effect; and general convenience requires that this principle should be adhered to." The case was this: John Philips devised his freehold and copyhold estates to his executors for sale and to turn into money, and provided for the distribution of the proceeds. The testator was a brewer and carried on that business in partnership with his relation, John Philips, but there were no articles of copartnership between them. In the course of their business, and after the date of the will, they purchased freehold and copyhold public houses for the purposes of their trade, with partnership moneys. Their uncle had also devised to them other copyhold estates, which they also used in their business. He also devised to them mortgages of other public houses, and the nephews out of the partnership funds purchased the equity of redemption. The history of the case seems not complete in *Mylne & Keene*, but additional facts have been given by Mr. Bisset in his work on partnership. (*Bisset on Part. 50. And see Perkins' Coll. on Part. § 145, and n.*) As reported by Mylne & Keene, one question was; whether the interest of the testator in the public houses purchased after the date of the will, by the copartners, was to be considered a part of his general personal estate, or

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only personal estate so far as required to discharge the debts and engagements of the trade. The bill was filed by the co-heiresses at law against the executrix and surviving residuary legatees, and the decision was against the plaintiffs. It appears from the corrections of this case by Mr. Bisset, that the public houses devised by the uncle, and the land upon which were the mortgages devised to them by the uncle, and of which they afterwards purchased the equity of redemption with partnership funds, were declared not to be part of the capital and effects of the partnership. (*Bisset on Part.* 50, *n.* *Perk. Coll. on Part.* 145, *n.*) The court, then, distinguished between the lands purchased with partnership funds, and those not purchased with partnership funds, or only in part. For the equity of redemption was paid for out of the partnership funds, and all was used for partnership purposes.

Broom v. Broom, (3 *Myl. & Keen*, 443,) was decided by the same judge, ten years after *Philip v. Philip*. On the strength of the latter case, as between the heir and administratrix, it was held that real estate, purchased by partners with partnership funds, for partnership uses, was, in equity, personalty. The same judge who decided *Randall v. Randall* and *Cookson v. Cookson*, decided *Houghton v. Houghton*, (11 *Sim.* 491.) Two partners purchased land for the purposes of their trade, and borrowed money to do it, for which they gave a mortgage upon the land. They erected trade buildings on it and paid for them, for insurance, and the interest on the mortgage, with partnership funds; and one died. The survivor took another partner and they did the same, and finally paid the mortgage out of the partnership property and took a reconveyance of the land to themselves, and the survivor of the first firm died. Held, against the heir of both of the first partners, that the land was personalty.

There are other cases bearing upon this question. (*Smith v. Smith*, 5 *Ves.* 189. *Bolmain v. Shore*, 9 *Id.* 500. *Rowley v. Adams*, 1 *Beav.* 548. *Custance v. Bradshaw*, 4 *Hare*, 315.) But I have referred to enough to show it may well be considered *quæstio verata* in England. Supposing the law laid down by *Ld. Thurlow* and *Sir Wm. Grant* to be overruled by the decis-

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ions of Ld. Eldon and Sir John Leach, still it seems that, where there is no express agreement, there is but one case in which the real estate is converted, out and out, into personal; that is, where it is purchased with partnership funds, for partnership purposes. (*Perkins' Coll.* § 154.) As between individual and partnership creditors, perhaps it might be different had property in severalty been greatly improved with the partnership funds.

The decisions in this country are as unsatisfactory as in England. Most of them are collected by Mr. Perkins in his edition of Collyer's work on partnerships.

In this state, the question has arisen but a few times. *Coles v. Coles* was a case at law, and was decided in 1818. (15 *John.* 159.) There is no doubt but the property descends to the heir, who is tenant in common with the survivors. (*Broom v. Broom, supra. Perkins' Colly.* § 133. *Howard v. Priest*, 5 *Metc.* 582. *Buchan v. Sumner*, 2 *Barb. S. & G. Rep.* 165.) But the dicta of the court went further, in *Coles v. Coles*, than to put the case on mere legal grounds. It was an action of assumpsit by the administratrix of a deceased partner, against the survivor, for a moiety of the avails of real estate conveyed by the partners, and which they had used in their partnership trade. It was contended that it was a partnership transaction, and required the investigation of partnership accounts. But the plaintiff recovered. The court say "the principles and rules of law, applicable to partnerships, and which govern and regulate the disposition of partnership property, do not apply to real estate." And it is added that "there may be special covenants and agreements entered into between partners relative to the use and enjoyment of real estate owned by them jointly, and the land would be considered as held subject to such covenants, but nothing of that kind appears in the present case; and in the absence of such special covenants, the real estate owned by the partners must be considered and treated as such, without any reference to the partnership;" and they rely upon *Thompson v. Dixon* and *Bolmain v. Shore*, both cases in chancery.

McCoun, V. C., in *Smith v. Jackson*, decided in 1833, (2 *Ed. Rep.* 28,) reviewed many of the authorities. Lands, which had

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been purchased by partners with partnership funds, and part of which was on speculation, were sold on mortgages given by the partner who had become insolvent, and the struggle was for the surplus money. The court held that it was liable to be applied to partnership purposes, and that the creditors of the firm were entitled to it; subject to an equitable right of dower in favor of the widow of a deceased partner, who had joined her husband in the mortgage. The vice chancellor treated the property as real estate, except that it was liable for the debts of the firm. He notices the English cases of *Thornton v. Dixon*, *Bell v. Phyn*, *Bolmain v. Shore*, and *Smith v. Smith*, and says it depends upon the agreement of the parties whether the property is to be considered, in equity, real, or converted into personal estate.

In *Delmonico v. Guillaume*, (2 Sandf. Ch. R. 366, in 1845,) Assistant Vice Chancellor Sandford held that real estate, purchased with partnership funds and for partnership purposes, and so used, was liable for the debts of the firm. He declined giving any opinion how it would be between the real and personal representatives.

Chancellor Walworth examined the subject very fully in *Buchan v. Sumner*, (2 Barb. Ch. Rep. 198 to 207.) The rule, as found in *Thornton v. Dixon*, *Bell v. Phyn*, and *Bolmain v. Shore*, he thought overruled by Lord Eldon in *Townsend v. Devaynes*; and that, unless otherwise expressed in the partnership articles, in England, real estate is considered in equity as personal property, and goes to the personal representatives; and cited *Selkirk v. Davis*, (2 Dow's P. C. 231,) and *Philips v. Philips*, *Broom v. Broom*, *Houghton v. Houghton*, and *Morris v. Kearsley*, (2 Young & Coll. 139,) before Mr. Baron Alderson. He however mentioned the later cases of *Rowley v. Adams*, *Randall v. Randall*, and *Baxter v. Newman*, (1 Lutw. Reg. Cas. 287,) as departures from this rule. But he considers the American decisions as establishing these two principles; that where real estate is purchased with partnership funds, ~~or~~ for the use of the firm, in equity it is chargeable with the debts of the copartnership, and with any balance which may be due from one copartner to another upon winding up the affairs of

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the firm. But that, as between the personal representatives and the heir at law of a deceased partner, his share of the surplus of the real estate of the copartnership, which remains after paying the debts of the copartnership, and adjusting all the equitable claims of the different members of the firm as between themselves, is considered and treated as real estate. These cases leave no doubt as to the law in this state; and this is reasonable. It is clear that all depends upon the intention of the parties. And in the absence of any expressed intention to that effect, how can it be presumed that a man intends to convert real estate into personal, and break the descent, merely because a portion of the partnership funds are appropriated for the purchase of real estate? If a member receives a portion of those funds as his dividend, and so appropriates it, clearly no such presumption arises. It is due to the creditors and the members of the firm that the property should not be withdrawn until the partnership affairs are adjusted. But as between heir and executor, the reason of the rule fails. Nor is it clear that the law of England differs so much from that of this state. All the earlier cases, at least, claim to put the conversion upon the intention manifested by the contract or will. And *Ld. Eldon*, to whom the paternity of the new rule is ascribed, so decided in *Ripley v. Waterworth*. The grounds upon which he decided *Townsend v. Devaynes*, are at least doubtful; and in *Stewart v. Marquis of Bute*, (11 *Ves.* 665, 1804, 6; *S. C.* 3 *Id.* 212,) he said: "In cases where persons engaged in partnership have bought freehold estates, the difficulty of distinguishing and arranging property of different natures, partly personal, partly real, has never, except by the effect of the contract, or the will, been held sufficient against the heir." The case was one on the construction of a will, but related to a colliery carried on by tenants in common in partnership. True in *Salking v. Davies*, (2 *Doug.* 242,) he thought all property involved in a partnership concern, ought to be personal; but he appeared to have doubts in the later case of *Crawshay v. Maule*, (1 *Swanst.* 508.) The change in the law, if any, is therefore more attributable to Sir John Leach; and recent cases seem returning to the

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former rule, which we have adopted. This is, that real estate owned by partners, remains so, unless an equitable adjustment of the concern requires its conversion, or the owner has expressed his intention that it be converted into personalty. (*See Dyer v. Clark*, 5 *Metcalf*, 577.)

But it is further contended, that there is an equitable conversion by the will of Townsend McCoun. The death of T. McCoun dissolved the partnership. (*Murray v. Mumford*, 6 *Cowen*, 441. *Cary on Partnership*, 162, 185.) A subsequent continuance of a concern may be provided for by will, but the intention should be clearly and distinctly expressed. (*Burwell v. Mandeville's Ex'ors*, 2 *How. U. S. R.* 560. *Scholefield v. Eicheberger*, 7 *Pet. R.* 586.) On his death his share of the real estate descended to the heir, Mrs. Phebe Buckley, unless affected by the will. And as the devisee in this instance is the heir, she took by descent and not as purchaser, unless a different estate was given her, or there was a conversion. Even if there is a charge upon the realty, (2 *Kent*, 507. *Ram on Wills*, 17,) I do not think there is any conversion. There is in terms no devise of this property to be sold for any purpose, nor a power or direction to sell. There is no clear intention that there should be an absolute conversion. (*Leigh & Dalz. on Eq. Conv.* 88. 2 *Story's Eq. Jur.* § 1213, *a. Bogert v. Hertell*, 4 *Hill*, 492.) A general direction to pay debts, it is said, is not a charge upon land for that purpose. (*Lupton v. Lupton*, 2 *John. Ch.* 624.) And that is so, it seems, where the executors are directed to pay and no land is devised to them. (*Ram on Assets*, 64, 5. *Keeling v. Brown*, 5 *Ves.* 359. *Powell v. Robbins*, 7 *Id.* 209. 2 *Story's Eq. Jur.* § 1247. And see *Rogers v. Rogers*, 1 *Paige*, 190; *Mollan v. Griffith*, 3 *Id.* 402; 2 *Wms. Ex'rs.* 1201.)

The first clause of the will reads, "First. It is my will that all my just debts and funeral expenses be paid by my executors hereinafter named." Upon this, the charge would be confined to property given to the executors. (*Id.* And *Warren v. Davies*, 2 *My. & Keene*, 49. 2 *Jarm. on Wills, by Perkins*, 523. And see *Dover v. Gregory*, 10 *Sim.* 393.) And here is

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a devise of other lands to the executors, which would be chargeable with debts, unless otherwise specifically and entirely appropriated by the will. (2 *Jarm. on Wills*, 525, and cases there cited.) I am, however, inclined to think the residuary clause also created a charge upon the remaining lands, if there was a deficiency of personal property. It gives "all the rest and residue of my estate and effects, real and personal, not herein otherwise effectually disposed of, (after payment of my debts, legacies, funeral expenses and other charges herein authorized,)" to his daughter. This comes within the rule laid down in *Lupton v. Lupton*, (2 *John. Ch. R.* 614. And see *Shallcross v. Finden*, 3 *Ves.* 738. 2 *Stor. Eq. Jur.* 1246. *Kidney v. Counmaker*, 1 *Ves. jun.* 436, and note.) Even if there had been a devise to the executors expressly for the purpose of paying debts, this clause evidently evinces an intention to make the *residuum* also subject to that charge in case of deficiency. (*Graves v. Graves*, 8 *Sim.* 43. *Bridgen v. Lander*, 3 *Russell*, 345, n. *Clifford v. Lewis*, 6 *Madd. R.* 33. *Withers v. Kennedy*, 2 *My. & K.* 607. *Jarm. on Wills*, ch. 45.) In *Douce v. Lady Torrington*, (2 *M. & K.* 600,) and *Palmer v. Graves*, (2 *Keen*, 545,) there was no clause giving the residue after payment of debts. And it would seem there was no real estate not before specified, in *Braithwaite v. Britain*, (1 *Keen*, 206,) and *Michouse v. Scaife*, (2 *My. & Cr.* 695,) and *Price v. North*, (1 *Phillips R.* 85,) are in point. But it is enough in this case that there is no expression which amounts to a conversion out and out; and, if there is a charge, there has been no sale; nor is there evidence of any deficiency of personalty to pay debts and legacies. (*Baily v. Elkins*, 7 *Ves.* 523. 1 *R. S.* 729, § 56. *Strong v. Strong*, 9 *Paige*, 98.)

Again, it is said that the agreement under seal between the partners, in 1825, is a declaration of an intention to consider this property personal. If this was the purport of that instrument, it may be doubtful whether the covenants would run with the land. However, I think it is not capable of any such construction. There is no evidence that the first lands were purchased by the partners as such, or with copartnership funds; and the

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grist mill, saw mill, &c. though afterwards paid for out of those funds, were conveyed to each one in severalty, by distinct deeds ; and the contract, which followed, so far from stamping that purchase with the character of personalty, expressly declares that any partner may sell all or any part of his interest in the factory or new purchase. The object was to regulate the use of the water so as to prevent litigation. This covenant is not so strong as in *Bolmain v. Shore*, already cited, (9 Ves. 500 ;) for there the realty was to be used by the partnership during its continuance ; and yet held no conversion, but rather evidence of a contrary intention. Besides, the covenant mostly relates to the new purchase, which was principally property used in business entirely different from that in which the old firm was engaged.

I have now disposed of all the points in the case affecting that share of the property formerly owned by Townsend McCoun.

The will of John Gale is also in evidence, and his executors, heirs, devisees and widow, are made parties. The first clause is : " 1st. I order and direct my just debts and funeral charges to be paid." He does not order his executors to pay them. This by the English rule, would create a charge upon the realty. (2 *Jarm. on Wills*, 512.) But a charge merely, as we have seen, does not alter the rights of the parties to the realty, until enforced. (1 *R. S.* 729, § 56.) Nor does a devise of lands in trust to sell and pay debts and legacies, if the devisee can not receive the rents and profits. (*Id. Germond v. Jones*, 2 *Hill*, 569.) Though different at common law. (*Hill on Trustees*, 231.) Much less does a mere power to sell. (*Taylor v. Morris*, 1 *Comst.* 358, *Jewett, Ch. J.*) And as to the equitable rights of the parties under this will, it is not possible for me to declare them, without knowing the situation of the estate. After the debts are all paid, the widow is to have an annuity of \$200 from the "dividends made from the cotton factory, if made to that amount." Without some evidence upon the subject I can not give directions for the distribution of the avails of Mrs. Gale's portion of this property. Nor is it necessary to decide whether

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there is a conversion. (2 *Sandf. Ch. R.* 343.) If the property is sold, the proceeds can be disposed of according to the rights of the parties under the will; and a reference, if necessary, may be ordered for the purpose of ascertaining them.

A decree must be entered declaring the copartnership of Wm. Mowry & Co. dissolved; and a reference ordered to take the accounts; the costs of this and of all the proceedings, not relating to partition of the real estate, to be paid out of the property belonging to the present firm, without reference to the real estate. I think good cause for a sale has been shown. The property is so situated and the parties are so numerous, probably a partition is impracticable without great prejudice to the owners. The property to be divided is the real estate owned by the partners at the time of the death of Townsend McCoun, and particularly set forth in the report; and this includes the fixtures and machinery annexed to the freehold, or which are usually thereto attached. The costs of the proceedings for the partition are to be paid out of the proceeds of the sale, and the balance divided as follows: To Wm. H. Mowry and Henry Holmes, each one-twelfth part as the grantees of John T. McCoun the devisee of Samuel McCoun. Unless their wives release, the value of their inchoate right of dower must be ascertained. (*Laws of 1840, ch. 177.*) To the widow, executors, legatees, devisees and children of John Gale, deceased, one-third, to be apportioned among them according to their rights, to be ascertained by reference if required. To Anne Caroline Holmes, wife of Henry Holmes, one-sixth, as devisee of Wm. Mowry, deducting the value of the interest of her husband. Whether there is issue of this marriage, is not in proof. He will take for their joint lives, or as tenant by the curtesy initiate, as that may be.

Of the remaining third, the plaintiff is entitled to the value of an estate for the life of Phineas H. Buckley therein. Also absolutely, to a reasonable proportion of the avails, as owner of one-third of the buildings and fixtures, and improvements made, built or purchased for the purposes of trade or manufacture, since the death of Townsend McCoun. But this does not in-

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clude erections, fixtures, &c. repaired merely and not originally made, erected, or entirely rebuilt, or purchased since his death. The remainder of the avails of this one-third belongs to the children of Mrs. Buckley; the share of Mrs. Rutherford being subject to any interest to which her husband is entitled.

[ST. LAWRENCE SPECIAL TERM, October 21, 1850. *Hand*, Justice.]

SEYMOUR and others, vs. MARVIN & ALLEN.

S. & W. were commission merchants at Albany, and the defendants resided at Oswego, and were dealers in wool, sheep skins, and pelts, and had been in the habit of consigning wool and skins to S. & W.; to be sold on their account. On the 18th of February, 1840, a contract was entered into between the parties, by which S. & W., on condition that they should have the selling of all of the defendants' wool and skins, agreed to do it at a commission of five per cent; that they would advance, or accept, on two thirds of the value of property put into their hands; that they would then advance \$2000 in cash for 90 days, at five per cent commissions; that when drafts should fall due, if not put in funds, they should be at liberty to sell the property at the market price, to meet the same; or if they should advance the money to pay the same, they would charge five per cent on such advances. *Held* that this agreement was not *usurious, per se*. That the transaction was not a *loan*, to be repaid in cash, like an ordinary loan; but was an advance made in the course of a legitimate commission business, where extra charges, on money advanced, are sanctioned by law.

Held also, that if it was a fair and bona fide transaction in the commission business, usury could not be predicated of it; but if it was a disguised loan, under the cover and in the name of commissions, it was usurious. But that before the court could pronounce the advances to be usurious, it must have some evidence showing that the commissions were exorbitant and unusual. The court can not take judicial notice of what are the fair and usual commissions on acceptances paid without funds.

Where a party insists that commissions of that nature, charged against him, are so high as to amount to a disguised act of usury, the *onus probandi* is on him.

A usurious contract is executed and extinguished by *payment*. Consequently, after usurious loans and advances have been paid, they can not be recovered back; except that the excess may be sued for within a year, under the statute.

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Where commission merchants, by direction of their principals, received and sold the goods of the latter, and applied the proceeds to the satisfaction of advances made by the commission merchants, which were alledged to be usurious, and the accounts of sales and of the application of the proceeds were delivered to their principals, and acquiesced in for over two years; *Held* that the payment must be regarded as having been made by the principals themselves.

Held also, that when the moneys were applied to satisfy the usurious debt, and the debtors acquiesced in, and ratified the payment, that act became a voluntary payment and satisfaction by the debtors, and extinguished the debt. That after that act there was no *locus pœnitentiæ* for the debtors.

A debtor has the right of saying to what account any given payment shall be applied. When he fails to make a designation, the creditor may apply it as he pleases.

And where a creditor, after having applied a payment made by his debtor to a particular debt, serves on the debtor an account current showing how the payment was applied, which is acquiesced in by the latter, such application will be conclusive upon him.

IN EQUITY. This case came before the court on exceptions taken by the plaintiffs to the report of a referee to whom it was referred to take and state the account between the parties, &c. The bill was filed for an account, and to compel the payment of whatever balance should be found due to the plaintiffs from the defendants. The defendants, in their answer, set up the defense of usury in the agreement under which the plaintiffs claimed to recover. The facts sufficiently appear in the opinion of the court.

S. Stevens, for the plaintiffs.

Geo. F. Comstock, for the defendants.

By the Court, GRIDLEY, J. By the decretal order of reference entered in this cause it was adjudged and decreed that the several accounts current mentioned in the pleadings should be deemed to be *prima facie* evidence that the items thereof, and the charges and discharges, were correct and just. And also that the defendants should be at liberty to falsify and surcharge the said account only in respect to the errors and omissions

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alleged in their answer; and to prove and insist that the contracts and agreements under which the advances of money were made by the several firms, represented by the plaintiffs, were usurious and void; and that the said advances were nor properly allowable in the accounts between the said parties, for that reason.

In stating the accounts the referee disallowed items in the plaintiffs' account, which accrued between February 18, 1840, and the 1st of August in that year, found in schedule A., on pages 164 and 165 of the case, amounting in the aggregate to \$8574,66, on the ground of usury.

It appears that Seymour & Wood, the predecessors of the plaintiffs, were commission merchants in Albany, and that the defendants were co-partners, doing business at Oswego; and were dealers in wool, sheep-skins and pelts. And that prior to the 18th day of February, 1840, they had been accustomed to consign wool and skins to the firm of which the plaintiffs are the successors, to be sold on their account. On that day an agreement was made by the parties, which was held by the referee to be usurious; in consequence of which the plaintiffs have been adjudged to be incapable of recovering any of the advances made under it. The proposition of the plaintiffs which the defendants alledge was accepted by them and constituted the agreement in question, is in the following words and figures, viz.:

"Terms. *First.* On condition we have the selling of all your wool and skins, we will do it at a commission of 5 per cent, including all charges, except such as we pay out. *Second.* We will advance, or accept, on two-thirds the value of property put into our hands. *Third.* We will now advance \$2000 in cash for 90 days at 5 per cent commissions. *Fourth.* No draft to be made on property short of, (one at 3 mos. and 3 at 4 mos. the last falling due the first of August,) \$6000 in all. *Fifth.* When your drafts fall due (if not put in funds) we are at liberty to sell the property at the market price to meet the same; or if we advance the money to pay the same, charge 5 per cent on such advances. Feb. 18, 1840. S. & Wood."

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It is a fair presumption, from the evidence, that this proposition was the result of a negotiation with the defendants as to the terms on which the plaintiffs would receive and sell their wool and skins, and make advances and acceptances on the wool and skins sent forward for sale. It is very clear that this two thousand dollars was not an ordinary loan. It was an "advance" on the faith of goods to be sent thereafter, and to be paid by a reimbursement out of the proceeds of sales. It was not a *loan* to be repaid in cash; but it was an advance as part of an entire agreement by which the plaintiffs were to have the selling of all the defendants' wool and skins, at a commission of five per cent. It is not called a loan, in the agreement. It was not contemplated that it was to be repaid in money, but it was to be satisfied out of the proceeds of the sales. In truth it has not been insisted, on the argument, that it is to be distinguished from the advances made, or acceptances before the receipt of the proceeds of sales.

I. Now we think that, upon the evidence before us, usury can not be predicated of these advances. It clearly is not usury *per se*. The transaction is not a loan to be repaid in cash, like an ordinary loan. It is an advance made in the course of a legitimate commission business, where extra charges, on money advanced, are sanctioned by law. Nevertheless it *may be* a cover and disguise, under the name and pretense of such advances, to get more than seven per cent for a loan of money. In other words, if this was a fair and bona fide transaction in the commission business, then usury can not be predicated of it; but if it was a disguised loan under the cover and in the name of commissions, then it is usurious. This doctrine will be found to be thus settled in *Trotter & Douglass v. Curtiss*, (19 *John. Rep.* 161,) in *Nourse v. Prime*, (7 *John. Ch. Rep.* 77, 8, 9;) *Kitchen v. Barber*, (4 *Hill*, 227 to 236;) *The Dry Dock Bank v. The Am. Life Ins. & Trust Co.* (3 *Comst. Rep.* 355 to 359;) It is like the case of a loan of money with the sale of goods, where, on the face of the transaction, it may be fair and bona fide; but where it may be shown to be a disguised loan, by *extrinsic evidence*. For example, A. may loan to B. \$1000 and

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sell him a horse at \$500, and take a security for \$1500. Now B. may assail this transaction, and show the horse to be worth only \$100, and that he was imposed on him at the advanced price, as a condition of the loan. So in the case under consideration, before we can pronounce these advances to be usurious we must have some evidence showing that the commissions are exorbitant and unusual. But it is insisted that such evidence exists in this case.

(1.) In *Trotter & Douglass v. Curtiss*, the plaintiffs charged a commission of two and a half per cent, on the amount of money advanced to meet drafts, where the defendants failed to send produce in time, and interest on the items charged in their account, from the time they became due. But it was proved that the general usage was in accordance with this charge. Chief Justice Spencer, in delivering his opinion, says that there is no pretense for saying that the commission charged by the plaintiff for accepting and paying the defendants' drafts when the defendant had not funds in their hands, was usurious. He puts his decision on the ground that the commission business was lawful; and that it was only where an exorbitant charge was made under the color of commissions, showing that the party intended, under that device, to get more than seven per cent for the use of his money, that the claim of usury could be supported. This was precisely like the case at bar, except that in the latter there is no proof of usage, and the commission was five per cent instead of two and a half, a distinction which I shall consider under another head. In *Nourse v. Prime*, (7 *John. Ch. Rep.* 77, 78,) Chancellor Kent held that half per cent commissions, agreed to by the parties, charged by stock brokers, was not usurious, though there was no evidence of usage. In *Suydam v. Westfall*, (4 *Hill*, 214, 224,) a majority of the court expressly approved of the case of *Trotter & Douglass v. Curtiss*, as an *authority*, and held a similar agreement free from usury. In *Suydam v. Bartle*, (10 *Paige*, 97,) there was no evidence of usage, and the chancellor says that if it were provided in the agreement that an advance should be made, it would still be a question of fact whether the two and a half per cent was intend-

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ed as a mere shift to cover an usurious premium on such advances as a compensation for the trouble and expense. On general principles, in the absence of any other proof that the price charged as commissions was unusual or exorbitant, it devolves on him who asserts that it is so, to prove the allegation. In *Nourse v. Prime*, before cited, Chancellor Kent says (7 *John. Ch. Rep.* 77,) "whether money was demanded or received usuriously, is a matter of fact, and rests upon the *intent*; and that intent ought at least to be charged, and confessed or proved. The court ought not to undertake gratuitously to deduce such intention, when the case is susceptible of another and better construction." In the case of *Marvin v. Feeter*, (8 *Wend.* 534,) it was held that a note which reserved interest from a day anterior to its date, furnished no evidence of usury. That there might be some arrangement arising out of the consideration of the note, that would render the reservation of interest allowable. That usury was a defense to be strictly proved, and the court would not *presume* a state of facts to sustain it. That where an intent is open to two constructions, one of which would render it operative, and the other void, the former should be adopted. In *Merritt v. Benton*, (10 *Wend.* 116,) it was decided that including one per cent as the difference in exchange between Utica and New-York was not usury *per se*; and as there was no evidence of what the true rate of exchange was, the plaintiff recovered. (See to the same point 3 *Cowen's Rep.* 284, 290; *Cro. Car.* 501.) We therefore think it was incumbent on the defendants to give some evidence showing that the percentage was unusually high, if they desired the court to hold the transaction usurious. The *onus probandi* was on them, to show that the advances charged as commissions were loans in disguise. The evidence of usage, if such evidence existed, should come from the defendants.

(2.) It is argued that the courts can take judicial notice that five per cent is an unusual commission; and that in the cases of *Trotter & Douglass v. Curtiss*, *Suydam v. Westfall*, and *Suydam v. Bartle*, the commission was only two and a half per cent. To this suggestion there are two conclusive answers:

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1st. These cases are not evidence of facts established or assumed on the trials, such as the customary charge of commission merchants on acceptances without funds. Should a counsellor, on a trial at nisi prius offer to prove, by reading those cases, what was, at Albany, between the 18th of February and the 1st of August, 1840, the customary commissions on the sales of wool and skins, and on acceptances without funds, he would be met by an objection that the case settled under the rules of court was no *evidence* of the *facts* in the cause before the court. Those facts were not proved, but were such as the parties had agreed on and the judge had settled. (2 *Hill*, 535. 15 *Wend.* 193.) The case is not between the same parties. (22 *Wend* 178.) The testimony did not have reference to the same *matter*. The case of *Suydam v. Westfall* respected the commission where the produce was *flour*. In the case at bar it was *wool and skins*. It did not relate to the same *time*. In truth there is no possible ground on which a reported case can be made evidence of the facts stated therein, against a stranger. 2d. The court can not take *judicial notice* of what are the fair and usual commissions on acceptances paid without funds. What may have been a fair and reasonable commission in 1840, may be very different in 1845. So too what may be the usual commission on *flour* and such like commodities, the sale of which is for cash, and promptly made, may be very different from the commissions on wool and skins, which are subject to great fluctuation and may be kept on hand a long time without sale. All these considerations are very material to vary the rate of commissions charged. And no court can undertake to pronounce that five per cent was an *unreasonable charge* in 1840, where the articles were wool and skins, and when no witness has been produced who has testified to this fact. The defendants examined witnesses residing in Albany and Oswego, who were dealers in wool, but the question whether those charged were unusually high was not put to them.

(3.) The *presumption* from the facts proved is that the charge was a *reasonable one*. The omission to examine the witnesses who were competent to speak on this point, renders it probable

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that their testimony would have shown the sum charged to be reasonable commissions. Again, if this were an exorbitant charge for commissions why did the defendants, who were experienced dealers in wool, accept the proposition contained in the exhibit dated the 18th of February, 1840? There were many other commission houses in Albany; and the spirit of rivalry and competition would have enabled the defendants to select a house that would do their business for a commission as low certainly as the customary rate. Again, the correspondence shows that the plaintiffs did not consider these advances by any means desirable to them. In the letter of April 25, 1840, the plaintiffs express their regret at receiving the drafts, which they would have to pay with their own money. And the whole correspondence shows that during this season both wool and skins were very low in the market, and that great pains were taken to make sales even at the prices those commodities would bring. Exhibit No. 5, is an account of sales, which shows how long the wool mentioned in it had remained on hand. The period was some nine or ten months. Now such being the condition of the wool market in 1840, can we say judicially that five per cent was an extravagant commission for advances and acceptances during that season? Especially when we know that the customary rates of commissions are dependent on those very circumstances? We think not. We say, as the court said in *Marvin v. Feeter*, (8 *Wend.* 534,) "We will not *presume* a state of facts to sustain that defense [the defense of usury] where the instrument [in this case the *contract*] is consistent with fair dealing." On the face of this transaction the items stricken out by the referee were commissions charged in a lawful business. And if the defendants would insist that they were so high as to amount to a disguised act of usury, the *onus probandi* was on them.

II. But suppose we are mistaken in our views on this point; and it be conceded that the advances were usurious; then the plaintiff claims that the usurious loans and advances are *paid*. If they have been in fact paid, I do not understand it to be contended that they can be recovered back. The excess may

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be recovered back within one year, by virtue of the statute. (1 R. S. 772, § 3.) But beyond this the party can not be allowed to go. The contract is executed and extinguished by *payment*. If a debtor conveys land to his creditor, in satisfaction of a usurious debt, the deed can not be avoided for usury. (*Den v. Dodds*, 1 *John. Cas.* 158.) So if a debtor makes an assignment, devoting his property to pay an usurious debt, in preference to others who are postponed but provided for in the deed, neither the other creditors claiming under the assignment, nor the assignees themselves, can set up usury against such debt. (*Bell v. Adams*, 7 *Paige*, 639, 641, 2, 4. *Green v. Morse*, 4 *Barb. S. C. Rep.* 341, 2. *Dix v. Van Wyck*, 2 *Hill*, 524.) If these advances have been *paid*, therefore, it does not matter that the goods received under a usurious contract were tortiously received. (5 *Denio*, 240.) Nor that the authority to sell, being part of the same illegal contract, is equally void. The question is, after all, whether the advances have been *paid*. The facts on which the plaintiffs rely to show that the advances have all been paid and satisfied, are as follows :

On the first of August, 1840, an account current was rendered to the defendants, in which the alledged usurious items were charged, and the defendants credited with moneys received, by which there appears a balance due the plaintiffs of \$2,072,67. The alledged usurious advances were all made prior to the 18th of June, 1840. After this date the plaintiffs advanced and paid, for the defendants, \$2,458,62 more than the balance due the plaintiffs upon the account current. On the first of August succeeding, the defendants were credited with the net proceeds of sales, to the amount of \$13,825,75. This account was acquiesced in. On the 13th of December, 1840, another account current was delivered to the defendants, in which they were charged with the balance on the preceding account (\$2,072,67,) and with the moneys advanced and paid, wholly free from usury, to the amount of \$16,810,84, and are credited with \$7,272,07. This satisfied the balance due on the 1st of August, 1840, and a large sum over. (See schedules D. and E. pp. 28 to 30, and pp. 31 and 32.) There were seven other accounts current ren-

dered at different times after December, 1840, showing the previous balances paid up successively, all of which were acquiesced in, without objection. On the first of April, 1841, the defendant Robertson became a member of the concern as a partner, on the faith of this balance, thus acquiesced in. And on the 1st of January, 1842, Mr. Wood died, and the defendant Forsyth became a partner in his room, on the faith of the balance then appearing due on the accounts rendered and acquiesced in.

We will now consider whether the advances charged to be usurious were not all paid as early as the 31st December, 1840. These advances had all been made before the first of August, 1840. After these usurious debts had accrued, the defendants sent wool and skins to the plaintiffs, which were converted into cash, and the proceeds were applied to the payment of these very advances, in pursuance of an agreement of the defendants. At any time before the application of these proceeds it is true that the defendants might have forbidden it, and directed the application to some other account; but they did not. They virtually directed the application precisely as it was made. It can not be denied that had the defendants sold the goods themselves and received the money, and paid it over to the plaintiffs, such payment would have been a satisfaction of the debt. Or had they sent the goods to some third person to be sold, and he had, in pursuance of the defendants' directions, paid over the proceeds, such payment would have been a satisfaction on the familiar principle, *qui facit per alium facit per se*. How does the application of the proceeds of the sales, by the plaintiffs themselves, to the payment of the advances, differ in legal effect? We can see no difference whatever. When the plaintiffs, by direction of the defendants, received and sold the goods, and applied the proceeds to the satisfaction of the usurious advances, they were acting with the consent and by the directions of the defendants. When those advances were thus paid, and the accounts of sales and of the application of the proceeds were delivered to the defendants, and acquiesced in for over two years, and till after the members of the firm had been twice changed, the payment must be regarded in law as made

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by the defendants themselves. It may be that the goods delivered under an usurious agreement were still the goods of the defendants; and when sold under the same void contract the proceeds were still the moneys of the defendants; but where the moneys were *applied to satisfy a usurious debt*, and the defendants acquiesced in and ratified the *payment*, that act became a voluntary payment and satisfaction by the defendants, and extinguished the debt. After that act there is no *locus pœnitentiæ* for the defendants. They can no more revoke this payment than he who had conveyed land in satisfaction of a usurious debt, could revoke the deed. The advances were paid, just as absolutely and unconditionally as if the money had been paid over by the hands of the defendants themselves. The learned counsel for the defendants has not been able to cite a single case, nor to advance a single argument, against the conclusiveness of this payment.

The law as to the application of payments is too plain to need the citation of cases in support of it. The debtor has the right of saying to what account any given payment is to be applied. When he fails to make a designation the creditor may apply it as he pleases. The plaintiffs applied the proceeds of sales to the payment of this very account for advances alledged to be usurious, and served on the defendants an account current showing such an application of the funds; which, being acquiesced in, the law declares is conclusive on them. (*Pattison v. Hull*, 9 *Coven.* 747. *Baker v. Stackpool*, *Id.* 420. 15 *Wend.* 19. 9 *Wheat.* 720. 3 *Denio*, 290. 5 *Id.* 470.)

It may be proper to say that this is not a case in which, from the omission of the parties to make an application of the payment, the law makes it for them. If it were such a case then the case of *Wright v. Laing*, (3 *B. & Cress.* 165; 10 *Eng. Com. L. Rep.* 44,) shows that the law would apply the payments to satisfy a valid debt, rather than a debt infected with usury. But this authority admits that it is only where the parties have made no application of the payments that the law appropriates them, even in the case of manifest usury.

Again; if the application of these moneys should not be re-

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garded as payment of the advances, still under the circumstances of this case, it seems to us that the defendants should be estopped from setting up the defense of usury. With full knowledge of the usurious character of these advances, (if in truth they were usurious,) they stood by and saw Robertson and Forsyth at different times enter into the concern as co-partners, and invest their capital against this large sum of \$8,574,66, under the impression that it was honestly due. After this, can they be allowed to say to these gentlemen that this balance is usurious? Did not these incoming partners embark their money on the faith that this sum was due from the defendants? And did not the defendants, by assenting to the accounts when rendered, by omitting to speak when they should have done, lure the parties on to an investment of their money against a balance which they now claim to be usurious, and resulting in a total loss, if the defendants shall ultimately prevail? We think this should not be allowed upon the ordinary principles of justice; but the decision of the cause need not be placed on this ground. Upon the other points we have discussed, and for the reasons we have given, we are of opinion that the exceptions of the plaintiff to the report should be allowed, and the case be referred back to the referee to re-state the account on the principle of allowing instead of deducting the disputed items.

[OSWEGO GENERAL TERM, May 5, 1851. *Pratt, Gridley, Allen and Hubbard, Justices.*]

GILBERT vs. LUCE and others.

A deputy sheriff is an *officer*, within the provisions of the revised statutes relating to the appointment and resignation of officers.

A deputy sheriff may resign his office, which becomes *ipso facto* vacant by such resignation.

Such resignation need not be under seal.

The statute does not leave any option with the sheriff to accept the resignation of his deputy, or not. When such resignation is received by the sheriff,

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the deputy ceases to hold his office, and his sureties are not responsible for any acts of his, done thereafter.

The liability of the sureties in a bond given to the sheriff by his deputy, will not be discharged by the sheriff's receiving a new bond from the deputy and continuing him in office, after his resignation; without making any new appointment, or the deputy taking the oath of office anew.

Where a cause is tried by the court, a jury being waived by the parties, the finding of the judge is conclusive as to all questions of fact, where there is any evidence upon the fact.

THIS was an appeal by the plaintiff from a judgment of non-suit entered at the circuit. The action was brought by the plaintiff, late sheriff of the county of Oswego, upon the bond given to him by the defendant Luce, his deputy, and the other defendants as sureties. The breaches assigned were various neglects of duty by Luce, in not returning executions delivered to him, or paying over the moneys collected thereon, for which neglects of duty the plaintiff had been made liable.

The defendants alledged in their answer that after the execution of the bond, and before the rendition of the judgments recovered against the plaintiff for the defaults of Luce, Luce resigned to the plaintiff his office of deputy sheriff, at the request of his sureties, of which the plaintiff had notice, and that the defendants were from that time discharged from all liability as the sureties of the said Luce. That after such resignation the said Luce, to wit, on the 11th day of May, 1838, procured another bond for the faithful discharge of his office as deputy of the plaintiff and delivered the same to the said plaintiff in lieu of the bond sued on, a copy of which substituted bond was set forth in the answer. That the plaintiff permitted Luce to act as deputy sheriff solely on the indemnity which the substituted bond secured to him, and not by reason of the bond prosecuted in this action.

The cause was tried by the court without a jury; a jury having been waived by the parties.

A. P. Grant, for the appellant.

E. Allen, for the respondents.

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By the Court, GRIDLEY, J. This is an action at the suit of the plaintiff, late sheriff of the county of Oswego, upon the bond executed by Stephen Luce, his late deputy, with four sureties, and dated on the first of January, 1838. Stephen Luce having been appointed a deputy, and having taken his official oath and given his official bond, entered upon the duties of his office. On the nineteenth of April following his appointment, he addressed to the plaintiff the following letter: "Sir, from circumstances beyond my control, I am under the necessity of resigning the office of deputy sheriff, to which you have seen fit to appoint me, and I hereby take this opportunity of resigning the same to you. (Signed,) STEPHEN LUCE." There was a postscript to this letter in the following words: "P. S. I have this day had an interview with the gentlemen who have signed my bond, and a majority of them manifested a desire that I should relieve them from any further liability in this matter. In consequence of the recent occurrence of which you are aware, and as a matter of course I have consented. It is possible that I may obtain another bond, and if I do, I should like a re-appointment, if you should accept the above resignation. Respectfully yours, S. LUCE." On the eighth of the following month, Luce did procure and deliver to the plaintiff another bond, executed by himself and his sureties, which was accepted by the sheriff; and Luce either resumed or continued to perform the duties of deputy sheriff. The defendants then proved by H. F. Noyes, that in 1842, at the request of one of the defendants, (a surety on the first bond,) he inquired of the plaintiff, if Luce had resigned his office of deputy sheriff; to which he answered that he had, and that Luce had procured other bail, and that he had continued him in office. He asked him for a copy of the resignation, to which he replied that it was mislaid.

Upon the evidence the judge nonsuited the plaintiff; and the question is whether that ruling was right.

(1.) We think it clear, beyond a doubt, that a deputy sheriff is an *officer*, within the provisions of the revised statutes relating to the appointment and resignation of officers. It is enacted (1 R. S. 372, § 84, 85,) that "any sheriff may appoint such and

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so many deputies as he may think proper," and "every appointment of an under sheriff or of a deputy sheriff shall be in writing, under the hand and seal of the sheriff, and shall be filed and recorded in the office of the clerk of the county. And any such under sheriff or deputy sheriff shall, before he enters on the execution of the duties of his office, take the *oath of office* prescribed by the constitution." That oath is found in the sixth article of the constitution of 1821, and concludes as follows: "And that I will faithfully discharge the duties of the *office* of — according to the best of my ability." There is in the form prescribed, a blank left for the name of the office, which must be filled in this case with the words, "*deputy sheriff*." Again, it is provided, (1 R. S. 107, § 5,) that "all assistants, deputies, and *other subordinate officers* (whose appointment shall not be specially provided for,) shall be appointed by the body, board, or officer, to which, or to whom they shall be respectively subordinate." Again, the very condition of the bond, on which the plaintiff sues, is that "Stephen Luce shall well and faithfully execute the *office* of deputy sheriff of the county of Oswego; a designation of the character of the trust, which the plaintiff is estopped from denying.

(2.) It is equally clear that a deputy sheriff may resign his office. Which becomes ipso facto vacant by such resignation. The thirty-sixth section of the act concerning resignations, vacancies, and removals, &c. declares that resignations may be made "by all officers, (other than such as have been enumerated,) to the body, board, or officers that appointed them." (1 R. S. 111, § 36, *sub.* 8.) Section 37, *sub.* 21, declares any office vacant on the resignation of the incumbent. Now, in the case at bar, the defendant Luce resigned his office on the nineteenth of April, 1838, and his resignation was accepted by the plaintiff, as is clearly proved by his own admission. An old rule has been cited that requires a resignation to be under seal when the appointment is under seal. But in this state, the acts of appointing and resigning are regulated by statute, and there is no such requirement to be found in any of the provisions on the subject. A seal is not necessary to the act of

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resignation; nor does our statute leave any option with the sheriff to accept or not. The act of resignation is the act of the deputy; and when he does the act, the office becomes vacant. When, therefore the resignation was received by the sheriff, in this case, the defendant Luce ceased to hold the office of deputy sheriff, and his sureties ceased to be responsible for any act of his, done thereafter. It was entirely right that the sheriff should keep the first bond, for his protection against any liability already incurred.

It can not affect the liability of the defendant on this bond, that the sheriff, on receiving the new bond, continued Luce as a deputy, without making any new appointment, or the deputy taking the oath of office anew; the sheriff can not take advantage of his own omission of duty to the prejudice of the obligors who had signed the first bond. Nor is the idea to be entertained that the sheriff took the second bond as an additional security instead of a substitute for the first. He knew by the postscript to the letter of resignation, that Luce had consented to resign because some of his bail were unwilling to remain liable any longer. There is not a particle of proof that the second bond was executed to afford the plaintiff additional security; but all the evidence tends to show the exact contrary. The fact that S. V. Schaick, who was a surety on the first bond, became surety on the second, is decisive evidence that the latter was not intended to be held by the sheriff as additional security. On this point the decision of the judge is final. The cause was tried by the court, the parties having waived a trial by jury. And as to all questions of fact, where there was *any evidence* on the point, the finding of the judge is conclusive.

The judgment must be affirmed.

[OSWEGO GENERAL TERM, May 5, 1851. *Pratt, Gridley, Allen and Hubbard, Justices.*]

BISSELL vs. BISSELL.

In matters of *practice*, merely, the day on which any rule is entered, or order, notice, pleading or paper is served, is to be excluded in the computation of time for complying with the exigency of such rule, order, &c.; and the day on which a compliance therewith is required must be included, except where it falls on a *Sunday*; in which case the party has the next day to comply therewith.

But in respect to the construction of *statutes*, the rule is otherwise, in this state. Accordingly where, under the statute requiring judgments before justices of the peace to be rendered within four days after the submission of the cause, a cause was submitted to a justice on the 28th of June, and judgment was rendered on Monday, the 3d day of July following; *Held* that the same was void, as not being entered in season.

THIS was an appeal by the defendant from a judgment rendered by the Oneida county court, affirming the judgment of a justice of the peace in favor of the plaintiff.

W. S. Parkhurst, for the appellant.

J. M. Carroll, for the respondent.

By the Court, GRIDLEY, J. By the 124th section of the act entitled, "of courts held by justices of the peace," it is enacted that "in cases where a plaintiff shall be nonsuited, discontinued or withdraw his action, &c. the justice shall forthwith render judgment and enter the same in his docket. In all other cases he shall render judgment, and enter the same in his docket, within four days after the cause shall have been submitted to him for his final decision." In the case under consideration, the cause was submitted to the justice on the 28th day of June, 1848, and judgment was rendered on Monday, the third day of July following, in favor of the plaintiff. The single question is whether the judgment was entered in season.

Were this a matter of practice merely, there could be no doubt that the judgment must be held regular. By the sixty-second rule of the supreme court, as well as by several adjudged

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cases, the day on which any rule shall be entered, or order, notice, pleading or papers served, shall be excluded in the computation of time for complying with the exigency of such rule, order, notice, pleading, or paper; and the day on which a compliance therewith is required, shall be included; *except when it shall fall on a Sunday, in which case, the party shall have the next day to comply therewith.* (2 *Hill*, 377, note. 3 *John. Rep.* 261. 10 *Wend.* 560.) The same rule prevails in England. In matters of practice, in all cases in which any particular number of days (not expressed to be clear days,) is prescribed by the rules or practice of the courts, the same shall be reckoned exclusively of the first day, and inclusively of the last day, unless the last shall happen to fall on a Sunday, Christmas day or Good Friday, or a day appointed for a public fast, or thanksgiving; in which case, the time shall be reckoned exclusively of that day also. (See 1 *Dowl. P. C.* 200; 8 *Bing.* 307; 3 *B. & Adol.* 393; 2 *Tyr.* 351; 4 *Bligh. N. S.* 608, cited in *Harrison's Digest*, 3d vol. p. 6328.) So also, an execution will be defeated by a writ of error filed within the first *four days*, exclusive of Sunday, after judgment is perfected. (1 *Cowen*, 15; 7 *Id.* 418.) And the same rule holds in the old practice, of entering judgment *nisi*. The four days within which a party might move in arrest, were four juridical days—Sunday not being counted. (11 *East*, 272. 13 *Id.* 21. 4 *Burrow*, 2180. *Graham's Pr.* 296.)

In respect to the construction of *statutes* the rule is otherwise, in this state. In the case of *Ex parte Dodge*, (7 *Cowen's Rep.* 147,) the last day of the period limited by statute, within which a party had a right to appeal, fell on Sunday. The appeal was brought on Monday. The court held that Sunday had in no case been excluded in the computation of *statute time*, and dismissed the appeal. The cases showing that Sunday would not be counted as one of the four days within which a party might move in arrest of judgment, were cited to the court. But they were said to be cases of practice, and not interfering with the rule which the courts apply in the computation of time under a statute. The same doctrine is laid down as the gene-

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ral rule in *Alderman v. Phelps*, (15 *Mass. Rep.* 235,) and in *Thayer v. Felt*, (4 *Pick.* 354.) Mr. Cowen, in his treatise, adopts and applies this rule to the case of a justice rendering judgment. (2 *Cowen's Tr.* 1022.) He says "the four days within which a justice shall render judgment, are to be computed as excluding the first day; and if the fourth day fall on Sunday, judgment must be rendered the day preceding." It is, however, supposed that a different rule has been introduced, where the time is *short of a week*. This rule is found in the case of *Thayer v. Felt*, (4 *Mass. Rep.* 354.) The case is cited in a note to an anonymous case decided by Ch. J. Nelson, in 2 *Hill*, 375. The principal case came before Judge Nelson on a motion, in which it was held that the *two* days within which a jury were to be summoned, and appear before the sheriff, to try a claim of property by virtue of the thirteenth section of the act concerning replevin, (2 *R. S.* 432,) were two *law days*, and that Sunday was to be excluded. Nothing is said of the rule adopted by the court in Massachusetts of excluding Sunday in all cases where the time was less than a week, and including it when the time exceeds that period. We are also referred to the case of *Whipple v. Williams*, decided by Justice Allen in 1849. He held that a notice of adjustment of costs served on the evening of Saturday for nine o'clock on the next Monday morning, at Cooperstown, some 30 or 40 miles from the residence of the attorney, on whom the notice was served, was overreaching and oppressive practice, and within the case of *Smith v. Brown*. (2 *Wend.* 245.) He also alluded to the case of *Thayer v. Felt*, as showing that the notice was irregular. We think, however, that the case might well be decided on the first ground mentioned by the judge. The superior court in the city of New-York have held that no such rule as that laid down by Justice Wilde in *Thayer v. Felt*, exists in this state, in the 2d of *Sandford's S. C. Rep.* 131, where Ch. Justice Oakley gives the opinion of the court. In truth, the adoption of such a rule would revolutionize the existing practice in many cases. If the rule is adopted, there is no reason why it should not be applied in matters of practice as well as others. But I allude

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to a familiar case under the former practice, where a notice of argument is required to be a four days' notice. In that case, a notice served on Thursday, for the *succeeding Monday*, was always held good. But on the principle of excluding Sunday, it would be too short. Again: a summons in a justice's court was directed by statute to be returnable not less than six nor more than twelve days from its date, (2 R. S. 160, § 14,) and to be served at least six days before the time of appearance mentioned therein. (§ 15.) Now if the summons were issued on a given day, it must be returnable one day later, by including Sunday, where there is only a six days' service. By the act of 1831, p. 403, § 33, a short summons or attachment was substituted in the place of a warrant; and such process was to be made returnable not less than two, nor more than four days from the date. Now if the warrant was issued on Monday, it might be made returnable on Friday; but if issued on Friday, it could be returnable on the next Wednesday, under the new theory of computing time less than a week. So, too, notice of sale on an execution must be posted up at least four days before the sale. (2 R. S. 182, § 41. 1 *Coven*, 421.) It follows that one rule of counting must be adopted if the notice be posted up on Monday, and another to comply with the rule in question, if the notice is posted on Wednesday. Without specifying more instances, it is quite apparent that the adoption of this new rule would introduce the greatest confusion in practice. In point of fact we believe that the universal custom has been to make no distinction where Sunday intervenes and where it does not. Sunday is always counted as one of the days, when the statute has declared that an act shall be performed within a given number of days; whether the number of days specified by the statute is longer or shorter than a week.

We must therefore reverse this judgment.

Judgment reversed.

[OSWEGO GENERAL TERM, May 5, 1851. *Pratt, Gridley, Allen and Hubbard, Justices.*]

A. & E. MORSE vs. CLOYES and HOVEY.

Although in pleading a bankrupt's discharge by a district court of the United States, the facts on which jurisdiction depends must be averred, yet when the discharge is offered in evidence, jurisdiction will be presumed, until the contrary appears.

The circuit and district courts of the United States, are courts of limited but not of inferior jurisdiction. If jurisdiction be not alledged in the proceedings, their judgments and decrees may be reversed for that cause, on a writ of error, or appeal; but until reversed they are not nullities, and can not be disregarded.

Although the bankrupt act makes the certificate of discharge evidence only when the discharge has been "duly granted," yet it need not first be shown that the requirements of the act have been complied with. The law will presume that the discharge was duly granted, until the contrary appears.

The rule by which jurisdiction in fact is presumed, from its exercise, does not attach by reason of the situation or character of the parties to the litigation, but by reason of the character of the court by which the decree was granted. And it is that character that gives efficacy to the decree, without proof of the preliminary proceedings to show the jurisdiction. Hence, whenever the decree is rightfully given in evidence due effect must be given to it, until it is shown that the court had not jurisdiction in the premises.

A bankrupt, after his discharge, is a competent witness for the plaintiffs in an action brought by his sureties to avoid a note given by them and the bankrupt, on the ground of usury.

To exclude the bankrupt as a witness, in such a case, it must be shown that at least there may be a surplus of his estate, to which he will be entitled. A surplus, and a consequent interest in the witness, will not be presumed.

Where interrogatories for the examination of a witness were not settled by an officer of the court under the statute, but were agreed upon by stipulation between the parties, and it was stipulated that the settlement of the interrogatories should be without prejudice to any valid objection to the competency of the witness; also to the admissibility in evidence of any entries in the books of the witness; also without prejudice to any valid objection on account of the immateriality of the first two cross-interrogatories; and with these reservations the interrogatories direct and cross were by such stipulation settled and were to be annexed to the commission; *Held* that by this stipulation the parties waived all objections to the form of the interrogatories; and that neither party could be allowed to make a mere formal objection, on the trial of the cause.

The section of the revised statutes which reserves to the parties every objection to the competency or relevancy of any question put to, or answer given

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by, a witness examined upon commission, is not applicable to a case in which the parties have expressly stipulated and agreed upon the objections which are reserved, thus by implication waiving every other.

Where a witness stated that at the time a particular transaction occurred he kept a cash book, in which he regularly entered all his cash transactions, and that the same was then before him, and produced to the commissioner, and in which the amount of money received by him from one of the parties was entered by him, and gave an extract from the book, containing that entry, and one immediately preceding and another succeeding it; *Held* that it was competent for the witness to refresh his memory by referring to, and examining such entry; and that it was competent for the party to prove by him how and by what means he refreshed his memory, with a view of ascertaining the reliance to be placed upon it; but that the testimony was not evidence of the truth of the matter contained in the entry, or upon the question of fact in issue.

In an action brought to avoid a promissory note on the ground of usury, and to restrain a suit at law commenced thereon, the usurious contract must be substantially set forth in the complaint and must be proved as laid.

Where a defendant in a suit at law has a defense of usury, which he can establish, by a competent witness, without a discovery from the alledged usurer, but is so situated that he can not avail himself of the testimony of that witness, in the suit at law, he may resort to a court of equity for relief, in order that he may examine such witness. He is not bound to rely upon the testimony of the alledged usurer, even though the latter has no legal interest in the event of the suit at law.

IN EQUITY. This cause was before the late court of chancery upon a demurrer to the bill of complaint, and will be found reported in 1 *Sandf. Ch. Rep.* 187, and 1 *Barb. Ch. Rep.* 404. After the decision of the demurrer the defendants answered, and amongst other things denied the allegation that the note in controversy was in truth the property of Hovey, and averred that it had been transferred to Cloyes upon a good consideration, and that Hovey had no interest in it. No proof was given upon this question, on the trial before the referee. The cause was referred by stipulation to a sole referee, before whom the cause was heard. Upon the hearing, the plaintiffs offered in evidence the discharge of Thayer from his debts by the district court of the United States for the northern district of New-York, under the late bankrupt act of the United States, certified in the usual form under the seal of the court. The defendant objected to

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its admission in evidence upon three grounds: 1. For the reason that the discharge did not set forth sufficiently the residence of said Thayer at the time the petition in bankruptcy was filed; 2. That the discharge did not sufficiently set forth the proceedings in bankruptcy to entitle the plaintiffs to read it in evidence, and that it did not show jurisdiction in the court granting it; and 3. That the plaintiffs should first prove the previous proceedings in bankruptcy: The referee overruled the objection, and the discharge and certificate were read in evidence. The plaintiffs then offered in evidence the deposition of Thayer taken upon a commission, and it was objected that Thayer was not a competent witness, for the reasons: 1. That he was entitled to a dividend of his estate under the bankrupt act; 2. That the code did not render him competent, because the note was given before the code took effect as law; 3. That he was liable over to the plaintiffs if they should be compelled to pay the note, and was therefore interested; and 4. That he was a party defendant in the suit upon the same note, in the supreme court, and was therefore substantially a party to this suit and interested therein. Before the decision of the referee as to the competency of the witness, the counsel for the plaintiffs produced an assignment of all the residuary interest and surplus of the bankrupt in his estate, to him, the counsel, purporting to have been executed at Quincy, Illinois, by the bankrupt, in the presence of a subscribing witness, before the taking of his deposition, and the counsel testified that he drew the assignment and transmitted it by mail to Thayer at Quincy, Illinois, his place of residence, and received it from him by due course of mail, executed as it now appeared, and that the subscribing witness resided in Illinois; that he knew the hand-writing of Thayer, and that the signature to the assignment was in his hand-writing. That he paid nothing for the transfer, and took it to remove any objection which might be made to the competency of Thayer as a witness. The defendant's counsel thereupon objected to the said assignment, and to the giving the same in evidence, for the reasons: 1. That the plaintiffs should produce the subscribing witness, by whom alone its execution could be proved; 2. That

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the plaintiffs had not proved the hand-writing of the subscribing witness ; 3. That the same was executed to make Thayer a witness ; 4. That it was void for want of consideration. The referee overruled the several objections as well as the objections to the competency of the witness, and admitted the depositions in evidence. The answers of the witness to several of the interrogatories were objected to, upon the ground that the interrogatories were leading in form, and the objection was overruled. During the trial, at the close of the plaintiffs' evidence, and again at the close of all the evidence ; the defendant took several objections to the right of the plaintiffs to recover in this action, and amongst others, that the plaintiffs had not established the usury by at least one credible witness over all the evidence on the part of Cloyes ; that the court had not jurisdiction, the plaintiffs having a perfect remedy at law ; and that there was a variance between the usurious contract alledged in the bill and that proved by Thayer. The referee ordered the bill to be dismissed as against Hovey, with costs, and a decree against Cloyes declaring the note void for usury, and restraining him from further prosecuting the suit at law therein, with costs to the plaintiffs as against him. Cloyes moved for and obtained a rehearing.

G. F. Comstock, for the plaintiff.

T. Jenkins, for the defendants.

By the Court, ALLEN, J. The objection to the admission in evidence of the discharge and certificate of Thayer was based upon the want of evidence, either appearing upon the face of the discharge or by extrinsic proof, that the court granting it had jurisdiction to entertain the proceedings, it being sought to bring the case within the rule which requires the jurisdiction of inferior courts and courts of special and limited jurisdiction to be affirmatively shown, before effect shall be given to their judgments or decrees. In *McCormick v. Sullivan*, (10 Wheat. 192,) it was held that the courts of the United States were courts of limited but not of inferior jurisdiction ; that if the

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jurisdiction be not alledged in the proceedings their judgments and decrees may be reversed for that cause, on a writ of error and appeal, but until reversed they are not nullities, and can not be disregarded. The court of appeals followed this case in *Ruckman v. Cowell*, (1 *Comst. Rep.* 505,) and held that although in pleading a bankrupt's discharge by a district court of the United States, the facts on which jurisdiction depends must be averred, yet when the discharge is offered in evidence, jurisdiction will be presumed until the contrary appears. The same case also answers an objection taken upon the argument, that the bankrupt act only makes the certificate evidence when the discharge has been "duly granted," and that it must first be shown that the requirements of the act have been complied with. Bronson, J. says in reference to the same ground, taken in the case cited, "But the law presumes that it was duly granted, until the contrary appears." It is urged, however, in this case, that this rule is only applicable when the discharge is offered in evidence in behalf of the bankrupt, and that it is otherwise when a third person seeks to give it in evidence. But the rule by which jurisdiction in fact is presumed from its exercise, does not attach by reason of the situation or character of the parties to the litigation, but by reason of the character of the court by which the decree is granted; and it is that character that gives efficacy to the decree, without proof of the preliminary proceedings to show the jurisdiction. Hence, whenever the decree is rightfully given in evidence, due effect must be given to it until it is shown that the court had not jurisdiction in the premises. It might be added that the bankrupt act, §4, provides that the discharge "shall in all courts of justice be deemed a full and complete discharge of all debts," &c. without limiting it to cases in which the bankrupt shall seek to avail himself of it. The discharge of Thayer was a material issue in this cause, in which the plaintiffs held the affirmative, and the legitimate evidence of the fact was the discharge and certificate which were given in evidence.

II. Thayer, after the proof of his discharge, was a competent witness for the plaintiffs. (1.) The result of the suit could

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not affect his liability upon the note, or to his sureties, the plaintiffs in this action. He was discharged from all liability as well to his sureties, if they should be compelled to pay the debt, as to the holder of the note. (*Crafts v. Mott*, 5 Barb. S. C. Rep. 305. *Earle v. Oliver*, 2 Ex. Rep. 71.) (2.) This being a suit between the creditor and the sureties of the bankrupt, to which neither the bankrupt nor his assignee is a party, the estate of the former in the hands of his assignee, in which he is supposed to have a contingent interest, will not be increased or diminished by the decree in this cause. If the plaintiff fails in this action, the decree by no means makes the debt a charge upon the bankrupt's estate; nor does it necessarily follow that they can charge it upon such estate. Neither is the decree in this action conclusive against the rights of the defendant as the holder of the note, to prove it as a debt against the estate. (*Kyle v. Bostick*, 10 Ala. Rep. 589.) (3.) A surplus after payment of the debts of the bankrupt, will not be presumed in this case. The proof shows that Thayer, in 1837, failed and made an assignment of his property for the benefit of creditors, and that in 1842, upon his voluntary application, he was declared a bankrupt and discharged from his debts. Interest must be proved. It lies with the objector to show that the witness has a direct and certain interest in the event of the suit. The defendant, to exclude the bankrupt as a witness, upon the ground of interest in his estate, should have shown that at least there might be a surplus to which he would be entitled. (*Duel v. Fisher*, 4 Den. 515. *Cowen & Hill's Notes*, 58, 256.) It is true that Nelson, J. in *Butcher v. Forman*, (6 Hill, 588,) and again after his elevation to the bench of the supreme court of the United States, in *Bridges v. Armour*, (5 How. U. S. Rep. 91,) says that if the event of the suit may increase the effects of the bankrupt in the hands of the assignee, and thus increase the surplus which would belong to him, he is interested. This would doubtless be so if it would increase a surplus. It does not follow that a surplus will be presumed to exist. But without commenting upon the language of the learned judge, it is sufficient to say that in both cases the remark was uncalled

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for, and was not necessary to the decision of the cause, and that he cites in support of it *Aflalo v. Fourdrinier*, (6 Bing. 306,) in which the question was not raised. In that case the witness had in advance done what is claimed to have been done in this case—released all his interest in his estate. If the remark of Judge Nelson was intended to convey the idea that a surplus and a consequent interest will be presumed, then it is in direct conflict with *Duel v. Fisher*, and inconsistent with the well established rule upon that subject. (4.) Thayer is not a party to this suit, and the code, § 398, made applicable to pending suits by the act supplemental, § 4, declares that no person offered as a witness shall be excluded by reason of his interest in the event of the action. (And see *Udall v. Walton*, 14 M. & W. 254.) Whether the decision of the referee, admitting in evidence the assignment from Thayer to Mr. Comstock, of all interest in his estate, was correct, is wholly immaterial. The evidence was given upon the collateral issue raised upon the competency of the witness, and not in the cause generally, and was immaterial in every aspect. First, the witness was not shown to be interested, so as to require such transfer in order to restore his competency; and secondly, if interested, he was still competent without such transfer, and the decision of the referee must necessarily have been the same if the assignment had been excluded.

III. The question next in order arises upon the objection to the answer of the witness Thayer to the 4th, 5th, 6th, 9th and 10th interrogatories, upon the ground that these interrogatories were leading in form. The interrogatories were not settled by an officer of the court under the statute, but were agreed upon by stipulation between the parties. It was stipulated that the settlement of the interrogatories should be without prejudice to any valid objection to the competency of Thayer as a witness, also to the admissibility in evidence of any entries in the books of said Thayer, referred to in said interrogatories; also without prejudice to any valid objection on account of the immateriality of the two first cross-interrogatories, and with these reservations that the interrogatories direct and cross be, and the

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same were by such stipulation settled, and were to be annexed to the commission. By this stipulation the parties waived all objection to the form of the interrogatories. They provided by it for the reservation of all rights and objections which they deemed important, and by such provision evidently designed to waive all others. It would be a fraud upon the plaintiffs to allow a mere formal objection to be made for the first time upon the trial, when if before made, it could so easily have been obviated. The statute (2 R. S. 396, § 23) reserves to the parties every objection to the competency or relevancy of any question put to, or answer given by, a witness examined upon commission; but that is not applicable to a case in which the parties have expressly stipulated and agreed upon the objections which are reserved, thus by implication waiving every other. In Massachusetts and Pennsylvania the rule is that objections to the form of the interrogatories must be taken before they are annexed to the commission and go to the commissioner. (*Porter v. Leeds*, 1 Pick. 308. 3 Binn. 130. *Anon.* 2 Pick. 165. 10 Serg. & R. 63. 7 Greenl. 181. And see per *Sutherland, J. Travers v. Ocean Ins. Co.* 6 Cowen, 415.) It is true that in *Williams v. Eldridge*, (1 Hill, 249,) it was held that the objection to an interrogatory annexed to a commission, on the ground of its being leading, may be made when the answer is proposed to be read in evidence; especially when the interrogatories are annexed under a stipulation, expressly *saving all legal exceptions*. It is conceded that error will hardly lie for allowing a leading question to be put in a personal examination of a witness; for the reason that the court have a discretion in permitting it, and the party whose right it is to object may certainly waive it. This point in *Williams v. Eldridge*, was rightly decided upon the form of the stipulation, which was entirely unlike the agreement in this case, and I am of the opinion the more reasonable practice, in the absence of a stipulation, is that adopted in Massachusetts. A leading question is always competent if not objected to. But the interrogatories are unobjectionable in point of form. The 4th and 5th, although leading, were merely introductory, to call the attention of the

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witness to the matters in controversy, and relate to matters alledged in the bill and admitted by the answer. The other interrogatories objected to were not leading, and did not point the witness to the desired answer.

IV. The defendant also objects to the answers of the witness to the 10th and 11th interrogatories in which the witness states that at the time of the transaction he kept a cash book, in which he regularly entered all his cash transactions, and that the same was then before him, and produced to the commissioner, and in which the account of money received by him from Hovey was entered by him, and gives an extract from the book containing that entry and one immediately preceding and another succeeding it. The objection was not to that part of the answer which gives the extract from the entries in the book, but to the entire answer, and was upon the grounds: 1. That the evidence did not purport to be called for with a view to refresh the witness' recollection, and was not therefore admissible for that purpose. 2d. That the evidence was incompetent for any purpose; and 3d. That it did not appear when the entry was made; and that the entry was not competent evidence for any purpose. The referee overruled the objection and held the answers competent, but not as evidence of the truth of the matter contained therein, or upon the question of fact in issue; deciding merely that it was competent for the witness to refresh his memory by referring to, and examining such entry, and that it was competent for the plaintiffs to prove by him how and by what means he refreshed his memory, with a view of ascertaining the reliance to be placed upon it. To this extent, and for the reasons assigned by the referee, we think the evidence admissible. The plain inference is that the entry was made at the time of the transaction, and was properly used by the witness to refresh his recollection. (*Cow. & Hill's Notes*, note 421, p. 550. *Per Chancellor Walworth*, 11 *Wend. R.* 485. *Robertson v. Lynch*, 18 *John. R.* 451. *Greenl. Ev.* §§ 486, 489. *Bank of Monroe v. Culver*, 2 *Hill* 531. 16 *Wend.* 599.) But if the answers to these interrogatories are stricken out, the result must be the same. The witness testifies positively to the usury, and

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under the circumstances of the case the decree would not be reversed if his recollection was not fortified by the entries in his books, made at the time. In *Steinkeller v. Newton*, (1 C. & P. 818,) the question was different, and was upon the admissibility in evidence of a copy of a letter, the original not being produced. No such question is made here.

V. There was no variance between the contract testified to by Thayer and that set forth in the bill of complaint. The usurious contract must doubtless be proved as laid. The contract must be substantially set forth in the bill and must be proved as alleged. (4 *Paige*, 533. 8 *Id.* 452.) The agreement alleged in the bill of complaint is that the borrower should deliver to Hovey the note in question for \$800, and that Hovey should lend and advance thereon \$760, receiving the note at its face and thus reserving \$40 as usurious interest thereon. This is alleged as the substance of the transaction. In his deposition the witness states the transaction precisely as stated in the bill, to wit, that he did deliver the note for \$800 and received as a loan thereon \$760, and further that the agreement was to pay interest at the rate of 12 per cent, five per cent being deducted from the amount of the loan, which is equivalent to payment in advance. (*Bank of Salina v. Henry*, 2 *Den.* 155. *S. C.* 3 *Id.* 593.) The note provided for the payment of the balance of the 12 per cent, it being on interest. The parties called the loan \$800. Five per cent upon that was \$40 which was paid precisely as stated in the bill. True, call the loan \$760 and the five per cent amounted to less than \$40; but the parties did not so treat it, either in the negotiation or in the consummation and carrying out of the contract.

VI. The only remaining question of importance is that raised by the defendant, to the jurisdiction of the court to grant the relief sought in this case. The plaintiffs, in their bill of complaint, allege that the usurious agreement was known only to Hovey and Thayer; that Hovey was the real party in interest, and that the courts of law had held that a party in interest not being a party to the record, could not be called and compelled to testify under the provisions of the act to prevent usury, passed

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May 15, 1837 ; and that Thayer being a party to the record in the suit at law, could not be improved as a witness in behalf of his co-defendants, the plaintiff in this action ; but that in this action they will be entitled to his testimony, and they waive an answer upon oath from Hovey, showing they rely in this court not upon any discovery from Hovey, but upon the evidence of Thayer. This ground, to wit, that in this court they can improve Thayer as a witness, while they could not do it in the action at law, they put forth and rely upon to give the court jurisdiction. Upon the decision of the demurrer to the bill in this cause which was interposed to the jurisdiction of the court, no stress was laid upon the allegation that the court of law had held that parties in the situation in which Hovey was alledged to be, could not be improved as witnesses. On the contrary, it was held that he was a competent witness and might be called by the defendants and compelled to testify in their behalf in relation to the alledged usury. So that it was not to enable the plaintiff to obtain a discovery from him, that the court overruled the demurrer and retained jurisdiction of the cause. That the plaintiff could have done in the suit at law. (*Morse v. Hovey*, 1 Sandf. Ch. Rep. 187. S. C. 1 Barb. S. C. Rep. 404. *Henry v. The Bank of Salina*, 5 Hill, 523. *Stevens v. White*, Id. 548.) The assistant vice chancellor held, and his decree was approved by the chancellor upon appeal, that although Hovey was a competent witness, the defendants in the action at law were not bound to rely upon his testimony, but could resort to the court of chancery, in which they could avail themselves of the evidence of their co-defendant in that action. It is true that the case stood then upon the bill with the allegation therein, that Hovey was the party in interest in the action at law, and that fact is alluded to in the opinions pronounced. That fact is denied in the answer and is not proved. It is now urged that the entire reason upon which the court of chancery overruled the demurrer to the jurisdiction, to wit, that Thayer was the only *disinterested* witness by whom the usury could be proved, was shown not to exist, and that Hovey was and is equally disinterested ; so that there was therefore no necessity

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for the resort to this action. It might be answered that it does not affirmatively appear that Hovey could have been compelled to testify. For aught that appears an indictment may have been found against him before the statute of limitations had run against the offense; and if so, he would have been privileged from testifying to any fact which would have formed a link in the chain of testimony necessary to convict him. (*Henry v. Salina Bank*, 1 Comst. 83. S. C. 2 Denio, 155.) But without resting the decision upon this view of the case, I think we may say with the assistant vice chancellor, that the plaintiffs in this suit were not compelled to rely upon the oath of Hovey. He was the usurer, and although as it now appears he had no legal interest in the event of the suit at law, as he had sold the note to his son-in-law; still, he was charged with an offense against the laws of the land, and although no legal penalty could, perhaps, have attached to an admission of the fact at that day, his reputation and character were involved in the charge. No man can be said to be entirely free from interest in an issue upon his guilt or innocence of a criminal offense, even if by reason of the lapse of time a prosecution is barred. An interest in that question will frequently greatly outweigh any pecuniary interest. And if a pecuniary interest adverse to the defendants in the suit at law, which did not destroy the competency, would authorize a resort to this court, then, in my judgment, the situation of Hovey and his relation to the offense charged, would equally excuse the defendant from relying upon his evidence when other evidence could be had by resorting to a court of equity. In the language of the chancellor, "if the complainant can establish this defense of usury by a competent witness without a discovery from the alledged usurer, but is so situated that he can not avail himself of the testimony of that witness in the suit at law, he may resort to this court for relief." (1 Barb. Ch. Rep. 406.)

The decree must be affirmed with costs.

[OSWEGO GENERAL TERM, May 5, 1851. Pratt, Gridley, Allen and Hubbard, Justices.]

CLARK vs. THE SYRACUSE AND UTICA RAILROAD COMPANY.

An action for negligence can not be sustained, if the wrongful act of the plaintiff co-operated with the misconduct of the defendant to produce the damages sustained. And this is so, whether the plaintiff's act was negligent or willful.

It is an act of negligence to suffer cattle to be at large in a highway, at railroad crossings. Therefore, where the owner of a cow suffered her to be at large in the highway, and upon a railroad track, at the usual time for the passenger train of cars to pass, and the cow was killed by the train of cars; *Held* that the owner could not recover the value of the cow, in an action against the railroad company.

Although a person has the right to use the highway, for the passage of his cows to and from the pasture, yet he must use ordinary and proper care and diligence in driving them; having reference to the situation of the road, and the manner in which it is used.

Where cows are trespassers upon a railroad, their owners can not maintain an action against the railroad company for running over and killing them by their passenger cars; even if the death of the cows was occasioned by the gross negligence of the defendants.

Accordingly, where it appeared that cows were pastured in a lot adjoining a railroad, between which and the railroad there was no fence, and there was no allegation in the pleadings to authorize evidence that they escaped on to the road through a defect of fences which the defendants were bound to repair, and no averment that the defendants were bound to fence at that point, or showing from what place, in what manner, or how the cattle came upon the road; *Held* that no action could be maintained against the railroad company for running over and killing the cows, by means of their engines and cars.

THIS action was brought to recover pay for three cows killed by the trains of cars on the defendants' rail road while the trains were going west down the grade which carries the railway over the canal west of Canastota, as the plaintiff alleged, through the defendants' negligence. The first cow was killed in September, 1845. She was passing along the highway which crosses the track of the railroad, with two other cows, having no person to attend them, and stepped on to the railway track as the engine was within about two or three rods of her. A person, in the plaintiff's employ, saw the cows come out of the field into the

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highway ; heard the train coming when it was one or two miles off, expressed a fear that the cows would be run over. The train was the regular passenger train, and passed at the usual hour. The cows came into the road through the bars, which were down, but by whom or for what purpose, they were let down, did not appear. The engineer did all he could to stop, but could not, and two of the passenger cars were thrown from the track, as appeared by the testimony of the engineer. The other two cows were killed together, in August, 1847. The plaintiff's cattle, to the number of 10 or 12, were running at large on the track of the railroad, 15 or 20 rods west of the highway. It did not appear how they came there. The defendants had remonstrated to him against the practice of suffering his cattle to run on the railroad track, and requested him to keep his cattle off the track. At the time of the accident the plaintiff knew that his cattle were on the railroad. He saw them there half or a quarter of an hour before the cars came along, and his brother saw them two hours before. He heard the train coming, when it was a mile and a half or more, away. The defendants, at this time, for the purpose of lessening the grade, had taken up the north track of their road, and raised the embankment upon it four feet higher than the south track, upon which the train was passing. The plaintiff's brother undertook to drive the cattle on this high embankment and off of the road. They got to hooking each other, and the two cows which were killed jumped down into the track just ahead of the engine. The ties lay up a foot and a half or two feet from the ground, so that the cows could not run, and they were struck by the engine and killed. The engineer saw the cows when he was 50 or 60 rods off, as he came around a curve. He gave the signal to break, reversed his engine, did all he could to stop, and had so far succeeded in checking his speed that he ran but about two or three rods after the engine struck the cows. There was no evidence to show where the cows were pastured on the day of the accident, but the *defendants* showed that on the day before, and for some time previous, they were pastured in a 12 acre lot north of the railroad and east of the highway, and that there was no fence be-

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tween that lot and the railroad. The defendants offered in evidence an agreement in writing, made between them and Asa Allis, who was proved to have been in possession of the land at the time the railroad was built, by which Allis agreed to maintain the fences along the railroad, and discharged the defendants forever from the obligation to maintain them. The evidence was objected to by the plaintiff, and excluded by the justice upon the ground that it raised a question of title. But the defendants did show without objection, that Allis actually built the first fence that was built after the railroad was constructed. The contractors for building the embankment purchased a strip of land along the railroad for the purpose of getting earth to make the embankment, and they took up the fence which Allis built, and laid it back on the plaintiff's land. The defendants had nothing to do with the purchase of the land, nor with the removal of the fence.

The jury gave a verdict for \$65, the full value of the three cows, and the justice rendered judgment for \$65 damages, and \$5 costs. The defendants appealed to the county court, where the judgment was affirmed, and they appealed to this court.

S. T. Fairchild, for the defendants.

——— *Snow*, for the plaintiff.

By the Court, ALLEN, J. Most of the questions which are presented in this cause, were considered and settled in *The Tonawanda Railroad Co. v. Munger*, (5 Den. 255,) and so far as the principles of that case are involved in this, we shall content ourselves by referring to and applying them to the facts. It would be a work of supererogation to add any thing to the reasoning of the able judge who pronounced the decision of the court, or to add to the list of authorities by which his conclusions are fortified. One of the doctrines laid down in that case, and which was before well established, is that an action for negligence can not be sustained, if the wrongful act of the plaintiff co-operated with the misconduct of the defendant to produce the

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damages sustained, and that this is so, whether the plaintiff's act be negligent or willful. The same rule is expressed in other cases, in language slightly different. In *Spencer v. Utica and Schenectady Railroad Co.* (5 Barb. S. C. R. 338,) it is said, "It is necessary for the plaintiff to establish the proposition that he himself was without fault." In *Brown v. Maxwell*, (6 Hill, 592,) it is said, "A plaintiff suing for negligence must himself be without fault." Was the plaintiff without fault, then, in suffering his cow which was killed in 1845, to be at large in the highway and upon the railroad track at the time of the accident? It was the usual time for the passenger train of cars to pass that point. It is conceded that the cow did not escape on to the road from the land of the plaintiff through any defect of fences which it was the duty of the defendants to repair. The evidence shows clearly that the bars to the field in which she was pastured were opened by some one, and the cow suffered to find her way alone to the plaintiff's house, which was at some distance on the opposite side of the railroad track. If the cow was thus suffered to go at large and alone along the highway and across the track, by the act of the plaintiff, or his servants, he is responsible for the consequences if such act contributed to the injury. And if the opening of the bars was the wrongful act of a stranger, still the defendants are not responsible. The wrongdoer must answer for it. It was an act which the defendants had no reason to expect, and were not called upon to guard against. In *Brownell v. Flagler*, (5 Hill, 282,) Bronson, J. says that it would be negligence to suffer a cow and a lamb to escape into a highway, and that if the lamb had been killed by a passing carriage, without any intentional fault in the driver, the owner would have had to bear the loss. And if it be negligent to suffer cattle to run at large on an ordinary highway, exposed to no danger except from the passing carriages, *a fortiori* is it an act of negligence to suffer cattle to be at large in a highway at railroad crossings. The defendants have the same right to occupy their roadway at the crossing for the passage of their cars, that a traveler has to use the highway for his purposes. It is true the plaintiff had the right to use the highway for the passage of his cows to and

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from the pasture ; but he must use ordinary and proper care and diligence in driving them, having reference to the situation of the road and the manner in which it is used. What would be proper care in one case might be gross negligence in another. At one time of day when no cars were passing, cattle might with impunity be suffered to pass and repass this railroad crossing without a driver. But not so at the hour at which this cow was killed. It is very clear that if the cows upon this occasion had been properly attended and driven, the accident could not have happened. And it is equally clear that the accident could not have been prevented by the defendants, at least not without extreme care, and that degree of diligence which they were not required to exercise. Ordinary care on the part of the plaintiff would have prevented the accident, and the loss must fall upon him. (*Hartfield v. Roper*, 21 *Wend. R.* 615.) The jury evidently rendered a verdict for the value of the three cows, as they estimated such value, but what amount they allowed for each can not be known, and as they erred in allowing to the plaintiff the value of the cow killed in 1845, the judgment must be reversed. But we are of the opinion that the plaintiff also failed to make out a cause of action in respect to the two cows killed in 1847. And without elaborating upon this branch of the case, the following reasons may be stated as among those which would upon the evidence preclude a recovery in this action.

I. The cows were trespassers upon the road of the defendants, and therefore the plaintiff can not maintain an action for their death, even if it was occasioned by the gross negligence of the defendants. (*The Tonawanda Railroad Company v. Munger*, 5 *Denio*, 255.)

II. There is no allegation in the pleadings to authorize evidence that they escaped on to the road through a defect of fences which the defendants were bound to repair. The reply alleges merely that the plaintiff was not bound to fence along the railroad about or near where the injury was committed. There is no allegation that the defendants were bound to fence at that point ; neither is it averred from what place, in what manner, or how the cattle came upon the road.

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III. There is no evidence to show in what manner the cows came upon the road.

IV. If the cattle escaped from the 12 acre piece, then the plaintiff was guilty of negligence in placing them there ; it being well known to him that there was no fence, and nothing to prevent their going on to the road. Even if it be conceded that the defendants should have made the fence, it can not, in this case, vary the result. The fence was not made. The statutory obligation resting upon the defendants might have been enforced, but it by no means authorized the plaintiff to turn his cattle upon the railroad track to the jeopardy of their lives and the lives of those passing over the road of the company. There are other difficulties in the plaintiff's case, which we will not refer to. Judgment of the county court and of the justice reversed.

[OSWEGO GENERAL TERM, May 5, 1851. *Pratt, Gridley, Allen and Hubbard, Justices.*]

PADDOCK vs. SYMONDS and others, superintendents of the poor
of Jefferson county.

Where a person sells to superintendents of the poor, provisions for the poor-house, upon an agreement that it is to be a cash sale, or if an order shall be given, that it shall answer as cash, whereupon the superintendents give him an order upon the treasurer of the county, for the amount, and upon presentment of such order to the treasurer payment is refused, for want of funds, the vendor is remitted to his original right of action against the superintendents, and may recover of them the value of the supplies. In such a case the county is liable on the contract made by its authorized agents, in the business specially committed to them by the statute : and that liability is to be enforced in a suit against the superintendents.

THIS was an appeal by the plaintiff from a judgment entered upon a report of referees. The action was brought to recover the value of provisions furnished to the predecessors of the defendants, as superintendents of the poor of the county of Jef-

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ferson, for the poor-house of said county. The referee denied a motion for a nonsuit, but he finally reported in favor of the defendants.

L. Ingalls, for the plaintiff.

G. C. Sherman, for the defendants.

By the Court, GRIDLEY, J. At the last July term, in the case of *Hayes v. The Superintendents of the Poor of Jefferson county*,^(a) this court decided, upon a full consideration of the authorities, that the superintendents of the poor were a corporation, possessing the usual powers of such corporations for public purposes. They were accordingly held to be able to contract, so as to bind their successors in office for the ordinary supplies furnished for the county poor-house. The judgment against them is to be satisfied in pursuance of sections 102 and 103 of the fourth article of title four, chap. eight, part third, of the revised statutes. (2 R. S. 387.) In the case referred to, the plaintiff failed to recover because it appeared that he had originally given credit to the "poor-house fund," instead of the defendants; or rather, that it was within the discretion of the referees to find that fact, and the court were bound to believe that they had so found.

In the case under consideration the plaintiff's claim is not embarrassed with any such difficulty. The action is brought by Loveland Paddock as the assignee of a demand for provisions furnished for the poor-house of Jefferson county by one Howk, on a contract with the superintendents. Mr. Howk was a witness, and distinctly swore that he sold the superintendents of the poor fifteen barrels of pork, in the spring of 1848, at \$14 per barrel; that all the superintendents were together, during the negotiation; and that the bargain was completed by two of them. The sale was to be a cash sale; or if an order was taken, it was to answer as cash. The two superintendents, then, as superintendents of the poor, gave him an order on the treasurer

(a) Reported 9 Barb. 280.

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of the county, payable to him or bearer, for \$210, the value of the pork. This order, and the account on which it was founded, were assigned to the plaintiff, and the draft or order was by him presented to the treasurer of the county, and payment refused, because there was no money in the treasury. This suit was then commenced, against the defendants. The superintendents had drawn at sight upon the treasurer of the county, who was the keeper of the fund appropriated by law to the support of the poor. (*See 1 R. S. 627, §16, sub. 8, 10. And see also p. 635, §54, (50) 2d ed.*) It seems to have been well understood that when the draft was drawn there were no funds in the treasury, applicable to its payment. But after waiting till the next February the plaintiff presented the draft to the treasurer, without success. Now when the plaintiff has failed to make the order available in satisfaction of an original claim against the superintendents, I think he is remitted to his original right of action. The superintendents are a corporation representing the county; and their draft on the treasurer is only a means to obtain the funds, from the county, and when a creditor of the county has used the appropriate means to obtain the fund, unsuccessfully, we are of opinion that he may resort to the superintendents of the poor, who were originally the contracting party, by a suit, which is the appropriate and the only remedy to compel the county to pay. (*2 R. S. 474, §102.*) But if this were otherwise, the predecessors of the defendants having drawn on the empty treasury, are liable, on the ordinary rules applicable to individuals drawing on a bank where they have no effects. (*See Franklin v. Vanderpool, 1 Hall's Super. Court Rep. 78; 17 Wend. 97; 21 Id. 375, and cases there cited.*)

The superintendents are the agents of the county in contracting the debt for the supplies of the poor-house, and are liable to be sued as a corporation, representing the county, on all such contracts. They gave the ordinary draft on the treasurer of the county, in payment and satisfaction of one of their contracts. The draft was not paid, for the want of funds. In such a case we entertain no doubt that the county is liable, on the contract made by its authorized agents, in the business specially com-

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mitted to them by the statute. And we have seen that, being liable, that liability is to be enforced in a suit against the superintendents. Otherwise a merchant who supplies the county poor-house with provisions, is without remedy; and that position being conceded, the county would soon be without credit.

We reverse the judgment, and send the case back for a new trial.

[OSWEGO GENERAL TERM, May 5, 1851. *Pratt, Gridley, Allen and Hubbard, Justices.*]

SAGE and others *vs.* GITTNER and others.

By the custom of warehousemen, known and established, they have the right to receive goods from a carrier, if in apparent good order, and advance to the latter his reasonable charges for the carriage of them, and to hold them subject to the lien of the carrier for the amount thus advanced; and if delivered to the owner without immediate payment, at the owner's request, a suit may be maintained to recover the amount advanced to the carrier.

And if the goods have been injured by the carrier, which injury is not apparent or known to the warehouseman, before or at the time of his receiving the goods, the owner must look to the carrier for his damages, and can not *recoupe* the same in an action by the warehouseman.

THE plaintiffs were warehousemen residing at the village of Ithaca. The defendants were merchants residing at the same place. In May, 1848, the latter purchased goods in the city of New-York, and agreed with one Downer to ship them to Ithaca for the defendants, and delivered them to the said Downer for that purpose, in good order. They came to the plaintiffs' storehouse at Ithaca, in apparent good order, but one of the hogsheads of sugar proved to have become wet, and damaged on the voyage. The plaintiffs paid to Downer the price of transportation of the goods, and charged it over to the defendants.

The defendants received the goods, but refused to pay to the plaintiffs the full price of transportation; claiming to deduct the amount of damage to the sugar. The plaintiffs proved at the

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trial that it was the custom of warehousemen every where, and of their house, to receive the goods from the carriers if in apparent good order, and pay the charges of the carrier, for their transportation, and charge it over against the owner of the goods; and that the goods in question were received by them, and the transportation paid, in pursuance of this custom. The plaintiffs recovered in the justice's court, which judgment was affirmed on appeal to the Tompkins county court, and the defendants appealed to this court.

S. Crittenden, for the appellants, cited 8 *Cowen*, 301; 8 *Wend.* 109, 117; *Anthon's N. P.* 57; 2 *Cowen*, 712.

W. R. Humphrey, contra.

By the Court, SHANKLAND, J. There is no pretense that the goods were injured by the plaintiffs, or while in their warehouse. But it is alledged that they were injured by the carrier before they came to the warehouse. The custom of warehousemen to receive the goods and to advance the freight to the carrier, was fully established; and the only legal question in the case is, whether the custom is valid, and whether it precludes the defendants from setting up the same defense against the plaintiffs that he could if the carrier had sued; or in other words, whether the rights of the plaintiffs, by virtue of this custom, are greater than the rights of the carrier.

I am quite clear that this is a valid custom, and binding on the parties. The defendants were merchants at Ithaca, where the plaintiffs' warehouse was situate, and must have been well aware of the existence of the custom, independent of the presumption of law, that parties engaged in certain branches of trade, or business, are acquainted with all the general customs appertaining to it.

Being acquainted with the custom or usage in question, the defendants must be deemed to have acted in contemplation of it, when they ordered Downer to transport these goods to Ithaca. It became an integral part of the defendants' contract with

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Downer, that if he delivered the goods at the warehouse, in *apparent* good order, the warehouseman would, and might, advance the freight to him; and it was likewise an implied authority to the warehouseman to receive the goods, if in *apparent* good order, and to advance the freight to Downer. The *custom became* the contract of all the parties.

This custom is highly convenient to all parties; and its general prevalence the best evidence of its reasonableness.

But the defendants contend that the custom, although proved, does not place the plaintiffs in any better situation than the carrier would be if he were plaintiff; or in other words, that the warehouseman is the assignee of the carrier's claim; and that any defense which would prevail against him, should prevail against the warehouseman. But this view of the case would destroy the custom itself; for I apprehend that no warehouseman would advance freight to the carrier, and run the risk of all defenses which might be interposed as between the owner and the carrier. The warehouseman can not possibly know the exact state of the goods at the time they are shipped, or if he did, he can not be expected to break open the boxes in which they are inclosed, for the purposes of inspection, before he receives them of the carrier. The custom as proved adopts the reasonable rule on this subject. If the goods are in *apparent* good order, at the time of delivery, it is sufficient. A greater degree of diligence, on the part of the warehouseman, ought not to be required. If the carrier fails in his duty, the owner has a remedy directly against him, adequate in all respects to protect himself against loss. But if the warehouseman is made responsible for damage done to goods, in the course of transportation, although such damage is not apparent, it is at least doubtful whether he can recover back his advances, from the carrier, unless some custom to that effect exists, of which we have no proof in this case.

The reasoning of the court in the case of *Allen v. Smith*, (8 Cowen, 301,) is not in opposition to the views above expressed. X
In the case cited there was no general custom proved, that the owners of the forwarding boats on the North river forwarded their goods, in the manner proved in that case, by putting them on

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board of other lines of boats, on the canal at Troy. It was only proved that it was the custom of the plaintiff's line, and *some others*, to receive goods from the transportation lines on the Hudson, with which they have no connection, paying the charges from New-York to Troy, delivering them at the places of destination, and charging to, and receiving from the owners, both their own freight and the moneys thus advanced. This evidence came short of proving a general custom, and the defendant in that cause was not bound by the custom of that particular line, unless he had actual notice of it, which was not pretended. (*Clayton v. Gregson*, 31 *Eng. Com. L. Rep.* 343. *Wood v. Hickok*, 2 *Wend.* 501.)

The case of *Van Santvoord v. St. John et al.*, (6 *Hill*, 157,) X decides that where goods are delivered to a carrier, marked for a particular destination, without any directions as to their transportation and delivery, save such as may be inferred from the marks themselves, the carrier is only bound to transport and deliver them according to the usage of the business in which he is engaged, whether the consignor knew of the usage or not. In that case the goods were received in New-York by a transportation company whose line ceased at Albany, and that company placed them on board of a canal boat and sent them to the owner at Little Falls, and they were injured on the canal. In an action against the first mentioned company for the injury, it was held, on proof of the uniform custom to forward by canal boats, and to receive pay from the canal boat for the transportation from New-York to Albany, the company was not liable, because the custom made part of the contract. See also 5 *T. R.* 389; 4 *Id.* 581; 17 *Wend.* 305; 5 *Burr. Rep.* 2714; 7 *East*, 224; X showing that the place of delivery is governed by custom.

No question was made on the trial as to the duty of the carrier to deliver the goods to the owner in person, instead of the warehouse of the plaintiffs. The custom proved would probably permit of a delivery at the latter place. At all events, the defendants seem to have sanctioned the place of delivery, by accepting the goods of the plaintiff and paying part of the carriage price.

I am inclined to affirm the principle, that by the custom of

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warehousemen, known and established, they have the right to receive goods from the carrier, if in apparent good order, and advance to the latter his reasonable charges for the carriage of them, and to hold them subject to the lien of the carrier for the amount thus advanced; and if delivered to the owner without immediate payment, at the owner's request, a suit may be maintained to recover the amount advanced to the carrier, in pursuance of such custom; and that if the goods have been injured by the carrier, which injury is not apparent or known to the warehouseman, before or at the time of his receiving the goods, the owner must look to the carriers for his damage, and can not *recoupe* such damage in an action by the warehouseman.

The judgment of the county court should be affirmed, with costs.

[TIOGA GENERAL TERM, May 6, 1851. *Gray, Mason, Monson and Shankland, Justices.*]

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LYON and others vs. SMITH.

The formalities necessary to the due execution of a will depend wholly upon statutory regulations; and as the statute now in force does not require the attestation to be in the presence of the testator, it is no longer necessary that the subscribing witnesses should sign it in his presence.

Accordingly, where the attesting witnesses saw the testator sign the will, and were requested by him to sign it as witnesses, and they subscribed it, not in the immediate presence of the testator, but in an adjoining hall; *Held* a sufficient attestation.

THIS was an appeal from the decision of the county judge of Tioga county, establishing the validity of a paper propounded as the last will and testament of Benjamin Smith, deceased. The facts will be found sufficiently stated in the opinion of the court. The cause was argued by

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J. J. Taylor, for the appellant.

Mr. Davis, for the respondent.

By the Court, SHANKLAND, J. The two important questions arising in this case are, First. Whether the three subscribing witnesses to the will propounded, or any two of them, were requested to subscribe as such, by the testator; and second, whether it was necessary that such witnesses should subscribe in the actual or constructive presence of the testator, in order to satisfy the statute.

These questions have been ably discussed by the respective counsel, and all the authorities bearing on the questions, cited and examined. The facts bearing on the first question are, that Boardman, one of the subscribing witnesses, who drew the will, is a non-resident of the state, and was not examined; but Edwin H. Schoonhoven, another of the subscribing witnesses testified, that Boardman, after reading or explaining the will to the testator, asked him "whether he wanted us to sign it as witnesses?" and he said Yes. Boardman named myself, my sister, and himself." The three persons thus named attested the execution. The sister of the last witness, who also attested the will, does not recollect of the request being made in the room where the testator lay sick; but thinks she was requested to subscribe by Boardman, in another room. But, if this were so, it does not contradict the fact sworn to by Schoonhoven, that he and Boardman were requested to subscribe by the testator personally. If two of the attesting witnesses became such at the testator's request, it is sufficient, although a third attested without such request. The statute requires but two witnesses. It was not necessary to call Boardman as a witness, inasmuch as he had become a resident of another state. (2 R. S. 58, § 13.)

Both of the attesting witnesses who were examined, saw the testator sign the will; and both swear that it was read over to him, and that he declared it was as he desired it.

But the appellant's counsel contends that the subscribing witnesses did not attest, or subscribe as witnesses, in the pres-

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ence of the testator, but did it in an adjoining hall, and out of the sight of the testator; and that they are not therefore attesting witnesses within the meaning of the statute. (2 R. S. 63, § 40.)

It is somewhat singular that this question has not been judicially settled in the twenty years which have elapsed since the revision of the statute on the subject of wills. For, with the exception of a *dictum*, to be found in *Butler v. Benson*, (1 Barb. S. C. Rep. 530,) no case has been found reported upon the subject; and on a personal inquiry of Chancellor Walworth, he informed me that he had no recollection of the question having been raised or decided by him.

The English statute, and all the revisions of our statutes prior to 1830, expressly required the subscribing witnesses to a will to become such, by attesting and subscribing in the *presence of the testator*. But in the revision of 1830 (2 R. S. 63, § 40,) the clause requiring it to be subscribed in the presence of the testator, was omitted by the legislature, although the revisers had reported the section with those words contained in it. (See *Revisers' notes*, 3 R. S. 627, §§ 5, 6.) The omission of that clause by the legislature, under the circumstances above mentioned, is a pretty clear indication of an intention to change the law in that particular. The late Chancellor Kent (4 Com. 514, 5,) notices this change in the language of the statutes, and clearly infers, that it is no longer necessary that the act of attestation should be in the presence of the testator.

It is doubtless a necessary requisite of an attestation to any instrument, that the witness subscribe at the time of the execution, or acknowledgment thereof, and with the knowledge and consent of the one who executes the instrument; (2 Wend. 575. 6 Hill, 303;) but I know of no decision, or principle of law, which requires the attesting witness to *subscribe* in the *presence* of the party who executes, except where it is expressly required by some statute. I consider the rule to be well and properly settled, that when a statute is revised, and some parts of the old are *omitted*, the parts omitted are not to be revised by construction, but are to be considered as annulled.

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The formalities necessary to the due execution of a will depend wholly upon statutory regulations; and as the present statute does not require the attestation to be in the presence of the testator, I am of opinion it is no longer necessary. Sufficient guards against fraud yet remain to protect the testator from imposition, and to identify the instrument declared to be his will. It is not the duty of the court to superadd others which the legislature has deemed no longer necessary.

The question of costs rested in the sound discretion of the surrogate; and it is one with which this court will not interfere. Such has been the uniform decision of this court, in cases like the present.

The decree of the surrogate is affirmed with costs.

[TIOGA GENERAL TERM, May 6, 1851. *Gray, Mason, Monson and Shankland, Justices.*]

MOTT, adm'r of O. H. Mott, vs. WALTER MOTT.

O. H. M. & W. M., being partners in the practice of medicine, on the 8th of October, 1849, entered into an agreement under seal, by which W. M. granted and sold to O. H. M. the jars, bottles and other furniture belonging to the office, except the stove, at first cost, and the stove for what it was worth, and the medicine in the office for what it should be appraised at, &c. W. M. for and in consideration of the above sale and of the sum of \$100 to him paid by O. H. M., bound himself "in the sum of \$500 liquidated damages, not to practice medicine in the village of S., or town of S., for five years" from the date of the agreement. O. H. M. agreed to buy the furniture, &c. and to pay the prices specified in the agreement. Another instrument, of the same date, under seal, was executed by the parties, by which O. H. M. sold and conveyed to W. M. the equal undivided one-third part of all the accounts, notes, debts, &c. due to the firm, and W. M. promised to pay to O. H. M. fifty cents on the dollar, on the said one-third of the demands, &c. These instruments, it was alledged, were executed and delivered at the same time, and related to the same subject matter. *Held* that there was a sufficient consideration for the contract, and that such agreement was not against public policy, although in restraint of trade;

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the extent of territory, and the length of time, to which the restraint was limited not being unreasonable.

Held also, that for a breach of the covenant by W. M. before the death of O. H. M., an action could be maintained by the personal representative of the latter.

Held further, that the sum of \$500 specified in the contract as liquidated damages was not a penalty, but that upon a breach of the covenant on the part of W. M. not to practice medicine, that sum was recoverable.

Parties may, by their mutual agreement, settle the amount of damages, uncertain in their nature, in respect to the performance or omission of a particular specified act, at any sum upon which they shall agree.

THIS cause was tried by the court without a jury. Orville H. Mott, the plaintiff's intestate, and Walter Mott, the defendant, were partners in the practice of medicine. On the 8th day of October, 1849, they entered into an agreement under seal, by which Walter Mott, for and in consideration of the premises thereafter mentioned, granted and sold unto the said Orville H. Mott "the jars, bottles and other furniture belonging to the office, except stove, at first cost, and the stove for what it is worth, and the medicine now in the office for what G. R. Berwords or Vandercook shall appraise them, and one Jarvis adjuster at \$50." And the said Walter Mott further covenanted as follows: "for and in consideration of the above sale, and for and in consideration of the sum of \$100, to him in hand paid by the said Orville," bound himself "in the sum of \$500 liquidated damages, not to practice medicine in the village of Schuyler-ville or town of Saratoga, for five years from this date." And Orville H. Mott, in consideration of the above, agreed to buy the property above mentioned and to pay the prices above specified. Another instrument bearing the same date was executed under seal by the parties, by which Orville H. Mott, for and in consideration of the money to be paid him as thereafter mentioned, by Walter Mott, bargained and sold, granted and conveyed to the said Walter H. Mott, his executors, administrators and assigns, as follows: "the one equal undivided one-third part of all the accounts, notes, due bills, debts and demands which are owing to us by individuals as partners in the practice of medicine, and the other business appertaining to

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the same; and I hereby authorize the said Walter to use all lawful means to collect the same, to and for his own use and benefit, but at his own risk and expense." And Walter H. Mott, for and in consideration of the above, promised to pay the said Orville H. Mott, his heirs and assigns, 50 cents on the dollar on the said one-third of said demands.

The complaint averred that both of these agreements were executed and delivered at the same time, and had reference to the same subject matter. Orville H. Mott died June 27, 1850, until which time he practiced medicine in the town of Saratoga, and it was alledged that he performed said agreements on his part in all things; but that the defendant had practiced medicine in the same place from early in May, 1850, until the death of Orville H., by which he became liable to pay \$500.

This suit was commenced before Orville H. Mott's death, and his administrator had been substituted in his place.

The answer denied that the two instruments were executed and delivered at the same time, or related to the same subject matter. On the contrary, it alledged that they were distinct; denied, generally, performance by the intestate, and averred performance by the defendants. It alledged that the first agreement was without consideration; and that whatever the defendant had done in the practice of medicine, was with Orville H. Mott's consent; and that, for a good consideration, before he practiced, Orville H. released the defendant from all liability on the agreement not to practice. The defendant also insisted that the covenants were personal, and did not survive. The plaintiff denied that the defendant had performed, or that the agreement was without consideration, or that the intestate consented that the defendant might practice medicine, &c., or that he released the defendant from his liability on the agreement, and insisted that the covenants survived.

It was proved that the defendant commenced the practice of medicine about the 20th of April, 1850, within the territory mentioned in the agreement, and continued to practice until after this suit was commenced. It appeared that after the agreement Orville H. Mott had invited the defendant to accom-

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pany him on his professional visits, in a few very severe cases. One witness testified that he applied to the intestate, in April, 1850, and he thought the latter part, at the defendant's request, to form a partnership with the defendant, which he declined, and said he had as much business as he could do, and did not care how soon the defendant came back; and that he, the witness, communicated this conversation to the defendant. Another witness stated that he told Orville H. Mott that he understood Walter was coming back, and he replied that he had no objections. Another witness swore that the intestate, after the suit was commenced, admitted that the \$100 mentioned in the instrument had not been paid. On the part of the plaintiff, a witness testified that in the spring of 1850, and he thought in April, at the defendant's request, he asked the intestate if he would take a certain sum and release him from his obligation not to practice, or go into partnership; both of which the intestate declined. That the defendant was then talking about coming back to Schuylerville. That about the time the defendant came back, the witness advised the defendant to take up or settle the bond, but he said he had no means to do it. Another witness testified that in the spring of 1850, and he thought in April, but it might be the last of March, at the defendant's request, he applied to the intestate for the same purpose, but the latter refused to make any compromise; and that he, the witness, informed the defendant of the result. Another witness stated that in the same spring, and he thought in the last of March or first of April, the defendant told him he had offered O. H. Mott \$50 to give up the bond, and offered to leave it to O.'s brother or brothers, and that he had refused; and that he, the defendant, had or should come back. That he thought he had offered all that was fair. Another witness testified that about the last of March or 1st of April, the defendant told him he had offered to go into partnership with O. H. Mott, or remunerate him if he would let him come back, and that he answered him very short, and he thought he was ungenerous. And at the defendant's request, he saw and told him what the defendant said, and he replied, if the defendant came back he should

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sue him; which answer he communicated to defendant. That after the suit was pending, and a short time before February term, the defendant said he offered O. H. Mott all that was fair, and he would not accept of it, and he thought it was wrong. Testimony was also given upon the point whether the two contracts were executed and delivered at the same time.

On the testimony being closed on the part of the plaintiff, the defendant moved for a nonsuit, which was refused, and the defendant excepted. The court directed the jury, if they found for the plaintiff, to find a verdict for the sum of \$500, subject to future consideration of the court; to which direction the defendant also excepted. The jury found that sum for the plaintiff, and also specially, that the defendant began to practice medicine in the village of Schuylerville, and in the town of Saratoga, on the 20th of April, 1850, and without the consent of the intestate. The defendant moved in arrest of judgment, and also insisted that the plaintiff was not entitled to judgment on the verdict upon the proof, and the cause was reserved for further consideration.

J. Mott, and H. W. Merrill, for the defendant, made the following points :

I. The cause of action does not survive. II. The obligation not to practice, &c. is without consideration, and void, the \$100 were not paid, and the purchase of the articles at their cash value, furnished no consideration to uphold the covenant. III. The consideration, if any, was wholly inadequate. IV. There was not only no consideration, but there was no good reason shown for entering into the contract. V. The two agreements can not be construed together. VI. The \$500 should be regarded and held as a penalty.

J. Lewis and A. Bockes, for the plaintiff. I. The material allegations contained in the complaint are admitted. II. Papers executed at the same time, and relating to the same subject matter, should be construed together. III. The cause of action accrued before the death of the intestate, and the action had been

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in fact commenced, and was a cause of action which survived. IV. There was a good consideration to uphold the agreement. Both agreements are to be taken together, and they show a sale of medicines, and the agreement recites a consideration also of \$100, as a special consideration. V. A release, to be effectual, should be under seal.

HAND, J. It is contended that by the death of the intestate the cause of action, if any, is extinguished; that it is personal, and does not survive to his representatives. But the covenant was broken before the death of the intestate, and the right of action therefore was not affected by that event. Upon the death of the covenantee, his interest vested in his personal representatives, for the executors or administrators of any person are implied in himself. (*Hurlstone on Bonds*, 115. 3 *Bac. Ab.* 59. *Toller*, 157, 437. *Platt on Cov.* 453, 520. *Chit. on Cont.* 96. *Siboni v. Kirkman*, 1 *M. & W.* 418.) In some cases, contracts are for the benefit of the judgment and taste of the party, and are considered personal. (*Siboni v. Kirkman*, *supra*. *Chit. on Cont.* 634. *Robson v. Dunn*, 2 *B. & Ad.* 403.) And notwithstanding the good will of a trade may be the subject of value and price, and may be sold, bequeathed or become assets, (*Tindall, C. J. in Hitchcock v. Coker*, 6 *Ad. & El.* 438,) I am not certain that a covenant restricting professional practice, if unbroken before, continued in force after the death of the covenantee; for it is for his reasonable protection. But here that question does not arise; for whatever claim for damages existed at his death, can be recovered by the representative. And the jury by their special verdict have found a breach in the lifetime of the intestate.

I have also come to the conclusion that here is sufficient consideration, and that the contract is not against public policy. The counsel for the defendant rely upon what was said by Mr. J. Bronson in *Chappel v. Brockway*, (21 *Wend.* 157,) and *Ross v. Sadgbeer*, (*Id.* 166.) In the first of those cases, the parties had been engaged in running packets, and the defendant sold out his interest in the concern for a pecuniary consideration;

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and agreed not to run on a certain portion of the canal. The consideration was deemed sufficient, and the reason for entering into the contract good. In *Ross v. Sadgbeer*, the agreement was that the obligor would not manufacture pearl ashes, &c. for a fixed period; and although it was not denied that a seal imported a pecuniary consideration, yet no good reason for the bond appeared. *Non constat* that it was not merely hiring a man not to exercise his trade, to his injury, without any benefit to the obligee.

In *Hitchcock v. Coker*, (*supra*), in the exchequer chamber, reversing the decision of the king's bench, it was held that the court would not look into the adequacy of the consideration, but only to see that some consideration appeared on the face of the declaration. That law has not been since disputed in England. (*Archer v. Marsh*, 6 *Adol. & El.* 959. *Sainter v. Ferguson*, 7 *M. G. & S.* 716.) Of course, there must be a consideration, as in all other contracts, or it would be *nudum pactum* and void.

Here a pecuniary consideration is expressed, and mere non-payment would not avoid the deed; and beside, there was a sale of the partnership effects. Without the second agreement, perhaps this sale does not appear; but the partnership and transfer of the effects of the firm are averred in the pleadings, and where that is done, those facts, it seems, can be proved. (*Ross v. Sadgbeer*, *supra*, *Best, C. J. in Homer v. Ashford*, 3 *Bing.* 322.) Certainly, the circumstances in which the parties were placed may be shown, to see whether the contract be reasonable.

In short, there is nothing appearing in or out of the contract, showing an inadequacy of consideration, or that the restraint was unreasonable. No one can say what the good will of the business, if that may be considered as included, was worth; and the sale of the property and the engagement not to practice, were parts of the same contract. And the extent of territory, and the length of time to which the restraint was limited, were not unreasonable, for the protection of the intestate. (*Chappel v. Brockway*, *supra*. *Ross v. Sadgbeer*, *supra*. *Sainter v. Ferguson*, *supra*. *Hitchcock v. Coker*, *supra*. *Leighton v. Wales*, 3 *M. & W.* 545. *Homer v. Graves*, 7 *Bing.* 743.

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Wallace v. May, 11 M. & W. 658. 1 Stor. Eq. Jur. § 292. *Chit. on Cont.* 576, *Perk. ed. and the cases there cited.*)

Several other objections to a recovery were taken, but none of them requires particular notice.

The rule of damages is the only remaining question. The defendant insists that the sum of \$500, specified in the contract as liquidated damages, is a penalty. It is sometimes difficult to apply any general rule to these cases, or to determine when the parties intended to ascertain and fix the amount of damages. It is said, where the same sum is stipulated as recoverable for a breach of every article in the contract, however minute and unimportant, no words will make it a penalty. But the parties may, by their mutual agreement, settle the amount of damages, uncertain in their nature, in respect to the performance or omission of a particular specified act, at any sum upon which they shall agree. (1 *Saund. Rep.* 58, c. n. d. And see *Dakin v. Williams*, 17 *Wend.* 447; *S. C.* 22 *Id.* 201; *Smith v. Smith*, 4 *Id.* 468; *Boys v. Ancell*, 5 *Bing. N. C.* 390. *Kemble v. Farren*, 6 *Bing.* 141; *Barton v. Glover*, 1 *Holt's N. P.* 43, and note to that case; *Chit. on Cont.* 759; *Sedgwick on Dam.* 449.) Under that rule, I think this is not a case of penalty. Indeed, in nearly all cases of this nature, where a certain sum has been agreed upon, as damages for the violation of an agreement restraining a party from the use and exercise of a trade or profession, the courts have considered it as liquidated damages. It has been so held in cases of physicians, surgeons, apothecaries, &c. (*Rawlinson v. Clarke*, 14 M. & W. 187. *Hitchcock v. Coker*, 6 *Ad. & El.* 488. *Sainter v. Ferguson*, 7 *M. G. & S.* 716. *Smith v. Smith*. 4 *Wend.* 468.) And of attorneys. (*Galsworthy v. Scott*, 1 *Wel. Hurl. & Gord.* 659.) And in other cases. (*Green v. Price*, 13 M. & W. 695. *Duckworth v. Allison*, 1 *Id.* 412. *Pearson v. Williams*, 24 *Wend.* 244; *Dakin v. Williams*, 17 *Id.* 447; *S. C.* 22 *Id.* 201. *Reilly v. Jones*, 1 *Bing.* 302. *Barton v. Glover*, 1 *Holt's N. P.* 43. *Crisdee v. Bolton*, 3 *C. & P.* 240. *Sedgwick on Dam.* 435, *et seq.* *Noble v. Bates*, 7 *Cowen*, 307.)

If the defendant had practiced at the request of the intestate,

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that, so far, perhaps, would not have been a breach, as being occasioned by the covenantee. (*Rawkinson v. Clarke*, 14 M. & W. 187, notes to the Amer. edition. And see 2 M. & G. 750.) Though the general rule is that a parol licence can not discharge a covenant, particularly before a breach. It can not be waived or discharged by a parol agreement. (*Cordwint v. Hunt*, 8 Taunt. 596. *West v. Blakenay*, 2 M. & G. 729. *Delacroix v. Bulkley*, 13 Wend. 73. *Chit. on Cont.* 107.) But the jury have found that there was no consent of the intestate.

There must be judgment for the plaintiff.

[SARATOGA SPECIAL TERM, JUNE 2, 1851. *Hand*, Justice.]

STRONG and others vs. CAMPBELL.

No action will lie in behalf of publishers of a newspaper, against a postmaster, for a breach of duty in refusing to receive the proofs offered by them in regard to the circulation of their paper, and to give them the publishing of the list of letters remaining in the post office, according to the act of congress and the instructions of the postmaster general, whereby they lost the employment, and the gains and profits arising therefrom.

DEMURRER to declaration. The declaration alledged that on the first day of December, 1847, the defendant was postmaster at the city of Rochester, and as such it became and was his duty, by force of the statute in such case made and provided, to advertise letters uncalled for at his office in the newspaper published at Rochester having the largest circulation; that there was at that time in said office a large number of letters uncalled for, which it was the duty of the defendant to advertise. That the plaintiffs then were, and ever since have been, the publishers and proprietors of a newspaper, printed and published daily in the city of Rochester, called the Rochester Daily Democrat; which paper then had, and ever since has continued to have, the largest circulation of any newspaper printed and published at Rochester, and were ready and willing to advertise the said let-

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ters at the price fixed by law. Yet the defendant, well knowing the premises, but contriving and wrongfully, maliciously and unjustly intending to injure and aggrieve the plaintiffs in that behalf, wrongfully, maliciously and unjustly refused and neglected to publish the letters uncalled for at his office in the paper so published by the plaintiffs; whereby the plaintiffs were deprived of the profits and advantage which would otherwise have accrued to them from the printing of the said letters.

The defendant demurred; and assigned the following causes of demurrer: 1. That the facts stated in the declaration did not make or state such a case as legally to give this court jurisdiction of the matters therein stated. 2. That it did not appear that the plaintiffs had any vested right in the advertising of the letters uncalled for in the post office at Rochester; nor that the duty on the part of the defendant to advertise the letters uncalled for in the post office at Rochester, was a duty to the plaintiffs, or in the due performance of which the plaintiffs had any exclusive interest or right. 3. That if it was the duty of the defendant to ascertain the letters uncalled for at all, it was only his duty to do so when ordered or directed by the postmaster general, and that it did not appear that the postmaster general ever gave any order to the defendant for the advertisement of letters uncalled for. 4. That it did not appear that there were at any time letters uncalled for, which it was the duty of the defendant to advertise in any paper. 5. That it did not appear that the plaintiffs ever offered any legal or competent evidence to the defendant of the amount or extent of the circulation of the paper published by the plaintiffs. 6. That it did not appear that the editors of the paper published by the plaintiffs ever agreed to insert any advertisement of the letters uncalled for, which it was the duty of the defendant to advertise in any paper, at the same or for any price not greater than that fixed by law, nor did it appear that the editors of such paper ever desired the advertising of such letters. 7. That if any duty devolved upon the defendant in directing in what paper the advertisement of uncalled for letters should be inserted, he acted in the performance of that duty judicially, and as a judicial officer, and was

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not amenable in a civil action for the manner in which he performed that duty. 8. That it did not appear that the paper published by the plaintiffs had any circulation in the city of Rochester, or within the delivery of the post office at Rochester; nor that the plaintiffs offered any evidence of any circulation of their paper in the city of Rochester, or within the delivery of the post office. 9. That it did not appear that the price allowed by law for advertising uncalled for letters was any more than it was worth to advertise the same; or that there were any gains or profits from such advertising. 10. That the statutes of the state of New-York do not prescribe any of the duties of a postmaster, and if there be any other statute prescribing the duties of the defendant as postmaster, the same should be specially set forth. 11. That it did not appear that there ever was any post office at Rochester. That the office of the defendant is not necessarily a post office.

Joinder in demurrer.

Geo. F. Danforth, for the plaintiffs.

H. Gay, for the defendant.

By the Court, JOHNSON, J. I have not deemed it necessary to examine the questions raised as to the sufficiency of the averments in the declaration conceding the action to be maintainable, because in my judgment there is no foundation whatever in law for an action, under any conceivable state of pleading, for such a cause. I think no case or precedent can any where be found which gives it the least countenance or support. This of itself would afford a very strong presumption against the right of action. But the position does not rest upon mere negative inferences. The authorities, I apprehend, will be found, on examination, to be abundant and conclusive against the right of action for the cause alledged.

The cause alledged is a breach of duty on the part of the defendant as a postmaster, in refusing to receive the proofs offered by the plaintiffs in regard to the circulation of their paper, and to give them the publishing of the list of letters remaining in

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the post office at Rochester, according to the act of congress and the instructions of the postmaster general, whereby they lost the employment and the gains and profits arising therefrom.

To give a right of action for such a cause, the plaintiff must show that the defendant owed the duty to him personally. Wherever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he had an interest in the performance of the duty, and that the duty was imposed for his benefit. But where the duty was created or imposed for the benefit of another, and the advantage to be derived to the party prosecuting, by its performance, is merely incidental and no part of the design of the statute, no such right is created as forms the subject of an action. In this I apprehend all the authorities will be found to agree. (*Martin v. Mayor, &c. of Brooklyn*, 1 *Hill*, 545. *Bank of Rome v. Mott*, 17 *Wend.* 556. 19 *Vin. Ab.* 518, 520. 1 *Salk.* 19. *Ashby v. White*, 6 *Mod.* 51.) In the latter case Holt, chief justice, laid down the rule that it must be shown that the party had a right *vested* in him, in order to maintain the action. And this I apprehend is the true rule. It must be an absolute vested right or interest in contradistinction to one incidental and contingent. The case of *Foster v. McKibben*, postmaster of Pittsburg, in the district court of Alleghany county, (*reported in the American Law Journal, new series, vol. 1, p. 411,*) is directly in point. The case is nearly in its facts identical with this, and the court held that the action could not be maintained. That case is authority so far only as its reasoning is sound. But the reasons given by the judge who delivered the opinion of the court, will commend themselves to every legal mind, with the weight and force of authority. It is unquestionably the duty of every officer to perform every duty imposed upon him by law, in the manner and to the extent prescribed, and he may be punished for every violation to the injury of the public or that of individuals. But it does not follow that some one has a right of action against him for every neglect or violation of duty, to recover private damages.

Now for whose benefit was the act of congress under considera-

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tion passed, and the instructions of the postmaster general given? Not surely that publishers of newspapers might be enabled to obtain profitable employment, and receive emoluments from the public treasury. That was no part of the design of the lawmakers. The design of the law obviously was, first, to benefit persons receiving communications through the post office, by giving the widest possible notice that letters remained on hand ready for delivery; and secondly, to secure the greatest amount of revenue to the department by the delivery of letters and the receipt of postage thereon, which might otherwise never be called for, and consequently be returned to the dead letter office. These plaintiffs had no direct interest in the observance of the law and the regulations of the department, except as they received letters at this office. Every person to whom letters were or might be addressed at this office had an interest in the performance of this duty. Whether such persons could maintain an action for a breach of this character, it is not necessary now to consider. But it is clear, I think, that these plaintiffs, as publishers of a newspaper, in which character they claim, had no such interest as gives a right of action. As connected with their paper they were not within the purview of the statute, except incidentally. It secured to them no fixed and absolute right, and imposed upon them no duty whatever. They were under no obligation to publish the list when offered, and their refusal would have involved no liability to any one. They might make a profit by the performance of the duty, but they sustain no loss by its non-performance. They would not be injured, in any legal sense, by a repeal of the law. We have many statutory regulations requiring notices in various legal proceedings, in sales upon executions, and the foreclosure of mortgages, to be published, some in the state paper and others in newspapers printed in the county. Should the person whose duty it was to publish these notices publish in the wrong paper, and the person for whose benefit the proceeding was instituted or carried on, thereby lose the benefit of the proceeding, and sustain an injury, undoubtedly such person might bring his action and recover his damages. But was it ever heard or claimed, before, that the proprietor of

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the paper in which the notice should properly have been published, had any such right or interest in the matter as would entitle him to maintain an action to recover the profits which the publication in his paper would have brought him? That would be a parallel case. The interest is too remote and contingent to be the foundation of a right of which the law takes cognizance.

The action is altogether misconceived, and the defendant must have judgment upon the demurrer.

[MONROE GENERAL TERM, June 8, 1851. *Welles, Taylor and Johnson*, Justices.]

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VAN SCOTER *vs.* LEFFERTS.

A person can not sell a debt against himself, to another.

A debtor has no interest in debts owing by him, which he can transfer. The property and interest in a demand belongs wholly to the creditor, and the debtor has no authority or control over it.

A demand due from a person to himself and another as partners, is, to the extent of his own interest in it, no debt against him.

Accordingly, where a member of a copartnership sold and assigned to another "all his interest in and to the property, goods, wares and merchandise and debts belonging to the firm;" *Held* that a debt owing by himself to the firm did not pass by the assignment; the "interest" of the assignor being only what remained over and above the amount of his indebtedness to the firm.

THIS was an action brought by the plaintiff to recover of the defendant a balance claimed to be due from the defendant for goods purchased by the defendant from the firm of Smith & Lefferts, while the defendant was a member of that firm. The complaint alledged that the defendant was indebted to the plaintiff on the 30th day of December, 1848, for goods, wares and merchandise, before then sold and delivered to the defendant, and interest thereon, in the sum of \$488,05. For that on the 13th day of February, 1840, the defendant was an equal partner with one Andy L. Smith, in selling goods, &c. at Hornellsville, in the county of Steuben, under the firm and name of Smith & Lefferts, and on the said 13th day of February, the

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defendant, for a valuable consideration, sold, assigned and transferred all his interest in and to the property, goods, wares and merchandise and debts belonging to the said firm, to Philander Hartshorn; and that at the time of such sale and assignment, the defendant was indebted to the firm of Smith & Lefferts for goods, wares and merchandise sold to the defendant by said firm, in the sum of \$301. That said sum was then justly due from the defendant to said firm; and that one equal half thereof was, by such assignment, sold and transferred to said Philander Hartshorn, the other half belonging to said Andy L. Smith; and that on the 21st day of September, 1847, said Andy L. Smith, for a valuable consideration sold, assigned and transferred to said Philander Hartshorn all his interest in and to said sum of money and debt against the defendant, and on the 20th day of April, 1848, said Philander Hartshorn, for a valuable consideration, sold, assigned and transferred the said debt and claim to the plaintiff, who thereby became the sole owner thereof.

An answer was put in, to which the plaintiff replied, and the cause was referred to a sole referee; who reported in favor of the plaintiff for the amount of his claim, including interest; and judgment being entered for the plaintiff, at the special term, the defendant appealed.

Reynolds & Brundage, for the appellant.

J. K. Hale, for the respondent.

By the Court, JOHNSON, J. Assuming, without any particular examination, that all the questions of fact were properly found and disposed of by the referee, there is a question of law, arising upon these facts, in which the referee manifestly erred.

On the 13th day of February, 1840, the defendant was a partner of one Smith, in selling goods, and on that day he sold to one Hartshorn all his interest in the partnership property and effects, for a certain sum, Hartshorn agreeing to pay his proportion of all the partnership debts, due from the firm of Smith & Lefferts. The defendant's interest in the stock in trade was

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greater than that of his partner, by \$1000, and this interest was purchased by Smith & Hartshorn jointly. An assignment in writing was made, and the books were examined, by which it appeared that the defendant had put into the firm \$9,467,81, and that he had withdrawn in cash at various times, \$1075,11. Nothing was said about any account on the partnership books against the defendant. The new firm went into operation immediately, and Hartshorn subsequently discovered there was an account against the defendant, upon the books of the firm, amounting to \$301,00 for goods taken by and charged to him. Whether there was any corresponding account on the books against Smith to balance this, does not appear, and in the absence of all proof the presumption is that there was none. Smith subsequently assigned his interest in this book account to Hartshorn, and Hartshorn transferred it to the plaintiff.

The referee decided that the plaintiff was entitled to recover the whole sum of \$301, with interest, amounting in all to \$422,21.

It seems to me quite manifest that in no view of this case could the plaintiff recover the whole of this account. Hartshorn never had any interest in this account till Smith assigned him his interest. Hartshorn only purchased the interest the defendant had in the firm at the time of the sale, and not that which he had previously drawn from it. It would be a legal absurdity to say that a person sold a debt against himself to another. The debtor has no interest in debts against him, which he can transfer. The property and interest in a demand belongs wholly to the creditor, and the debtor has no authority or control over it.

Assuming that this \$301 had been taken from the joint stock, before the sale, what was then the state of the case as between the defendant and his partner Smith? If their interests were equal, the defendant would be liable to pay Smith just one half the amount, and would be entitled to retain the other; he being joint owner of the property taken. Hence it follows that if Hartshorn was really deceived as to the existence of this account against the defendant for goods, the interest which he acquired by his purchase was just \$150,50 less than what he expected or

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supposed it to be. He took what interest the defendant then had, and no more. For this amount the defendant may be liable in some other form of action, as for fraud in the sale, or upon a warranty as to the extent of his interest: but it is clear that no such interest was acquired by Hartshorn by his purchase. He took by that precisely the interest and rights which the defendant would have been entitled to on a settlement and adjustment of all the partnership matters between him and Smith at that time, and no other or greater. Smith and Hartshorn constituted an entirely new and different firm. The former partnership was at an end when the defendant sold out his interest.

There is some evidence to show that the defendant had promised to pay this amount, and that promise may be good so far as the amount due Smith was concerned. But for any thing beyond that, it would be entirely without consideration and void. He owed nothing beyond that. It is perfectly obvious that a demand due from the defendant to Smith and himself as partners is no debt against him, to the extent of his own interest in it.

There are several other questions in the case which do not affect the result, in the view I have taken, and it is unnecessary to notice them. We might dispose of this case by ordering a new trial unless the plaintiff should consent to strike out one half of his recovery, and in the event that he did so, permit the judgment to stand for the balance. But as the case seems to have been tried entirely upon erroneous notions as to the right of all the parties at the termination of the first partnership, I think the ends of justice will be better subserved by ordering a new trial. Judgment of special term reversed. New trial ordered. Costs to abide event.

[MONROE GENERAL TERM, JUNE 3, 1851. *Welles, Selden and Johnson*, Justices.]

S. & J. BREWSTER *vs.* SILENCE.

A guaranty of the payment of the note of another, made coterminously with the note and for a good and valuable consideration in fact, is not valid and binding, within the statute of frauds, unless a consideration is *expressed* in it. WELLES, J. dissented.

A guaranty, indorsed upon a promissory note, immediately after the making thereof, and before its delivery, is no part of the note, but is a separate and distinct undertaking, although made for the same object as the note.

THIS was an action upon the guaranty of a promissory note. The note and guaranty were as follows:

"\$140,00. By the first day of November next, I promise to pay to the order of John Thompson, at the Rochester City Bank, one hundred and forty dollars—value rece'd. with use.

GEO. SILENCE.

Rochester, April 18, 1848."

"I hereby guarantee the payment of the above note.

F. SILENCE."

The cause was tried at the Monroe circuit in October, 1849, before the Hon. Thomas A. Johnson. The jury found a special verdict, by which the execution of the note was ascertained; and that at the same time the note was made, the defendant signed the guaranty indorsed thereon; that the consideration of the note was a pair of horses, sold to Silence by the payee of the note, and that a condition of the sale to him was, that the note should be guaranteed by the defendant; and that the sale was not consummated until after the execution of the guaranty. That after the execution of the note and guaranty the horses were delivered by the payee to Silence, and at the same time he delivered to the payee the note and guaranty. Upon this verdict the justice who tried the cause ordered judgment for the defendant, and the plaintiffs appealed to the general term.

Paine & Cochrane, for the plaintiffs.

C. H. Clark, for the defendant.

JOHNSON, J. The guaranty upon which this suit is brought, was made and indorsed by the defendant upon the note, immediately after the making thereof, and before its delivery. There can be no doubt in this case, that the sale and delivery of the horses by the payee of the note, upon receiving the note and guaranty, was mainly upon the faith of the guaranty. That formed the principal foundation of the credit. The case therefore presents the precise question whether a guaranty of the payment of the note of another, made cotemporaneously with the note and for a good and valuable consideration in fact, is valid and binding, within the statute of frauds, where no consideration is expressed in it. The horses were sold and delivered to the maker of the note. The plaintiff's counsel contends that the note and guaranty being made at one time, and for the same object, that is, to enable the maker of the note to purchase the horses, they form but one instrument; that the guaranty is part and parcel of the note. I am of opinion, however, that the guaranty is no part of the note. It is a separate and distinct undertaking. The note is an absolute unconditional promise to pay the amount named. The guaranty is only a promise to pay on condition that the maker fails to do so, according to his undertaking. No action could have been maintained against the maker and the defendant jointly. This contract of guaranty is as well understood and as accurately defined as that of indorsement, or any other known to the law. That the making of it at the same time with the note upon which it is indorsed, does not alter its character and make it a different undertaking from what it purports on its face to be, is now pretty well settled. (*Hall v. Farmer*, 5 *Denio*, 484; *S. C.* 2 *Comst.* 553.) It is clearly then a special promise to answer for the debt, default or miscarriage of another. Such being the character of the undertaking and no consideration being expressed, can it be enforced by an action? I apprehend not. If the statute had provided that an agreement of this character should be void unless founded upon a good consideration, there would be no difficulty in maintaining the action upon this guaranty. But

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the statute declares explicitly that the consideration shall be *expressed* in the agreement, or it shall be void.

It is perfectly immaterial what the consideration is in fact: unless it appears upon the face of the agreement, the statute makes it *ipso facto* void, and the court has no power to declare it good. It can not, without a gross and palpable usurpation of power, absolve parties from the plain requirements of the statute. The statute has prescribed the kind of evidence which shall give force and vitality to these agreements, and we can not dispense with it and substitute some other. The consideration must be expressed in the agreement itself and not in some other agreement to which it is collateral.

The payee of the note doubtless contracted for it with the understanding that there should be a valid guaranty upon it by the defendant, and parted with his property supposing he had such. But it was his folly or his misfortune to part with his property and accept a promise which the law will not aid him to enforce. It is far better that he should lose his property and these plaintiffs their debt, than that the court should undertake to relieve parties from the consequences of their mistakes or follies, by perverting the law of the land. It is of no consequence that the defendant took security to indemnify him against his supposed liability. That does not aid the contract. The statute still remains in force, declaring it void. The action is upon the guaranty, and if that is void the action must fail.

I have not attempted to go over the numerous and somewhat conflicting cases upon this vexed question. This case presents a naked point which has never been fairly met and decided since the revised statutes went into effect. Our courts seem to have struggled hard to evade it and pass by on some other side. I regard the statute as plain and imperative, and I confess I feel much more inclined to yield to its authority than to any array of opinions or dicta which have sought to evade and nullify it, to save hard cases and prevent or remedy some particular act of injustice.

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I am of opinion that the judgment of the special term should be affirmed.

SELDEN, J. concurred.

WELLES, J. dissented.

Judgment affirmed.

[MONROE GENERAL TERM, June 3, 1851. *Welles, Selden and Johnson, Justices.*]

CARTER vs. HAMILTON and SCOTT.

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The amount for which a note is made payable can not be varied by parol, except by showing want of consideration, fraud or mistake.

A party may, by oral or extrinsic evidence, prove a fact which in law would be a sufficient answer to a part or the whole of the plaintiff's claim, provided that fact was not known to the parties, or one of them, and was not a subject of negotiation between them, either before or contemporaneously with, the making of the contract. But he can not, in order to vary, contradict, or explain such a contract, introduce oral and extrinsic evidence of any agreement by the parties, by parol, made either at the same time or before, affecting that contract.

Accordingly, where the defendant purchased at auction a quantity of wheat, growing, at \$9,75 per acre, represented to be 105 acres; and gave his note for the amount; *Held* that in an action upon the note the defendant could not be allowed to prove by parol that the agreement at the sale was that the land should be afterwards measured, and the price vary as the number of acres should vary from 105; and that on subsequent measurement it was found to contain but a fraction over 94 acres.

THIS was an action brought to recover the balance due on a promissory note, bearing date December 8, 1848, made by the defendants, payable to John Coe, executor of Luther Carter deceased, or bearer, for \$1033,88, with interest, upon which it was admitted the sum of \$940,04 had been paid; and \$155,94 was still claimed by the plaintiff, to whom the note had been assigned, as remaining due on the note.

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In the answer the defendants set forth that the said Coe was executor of Luther Carter deceased; that at the date of the note the said executor caused certain personal property, belonging to the testator, to be sold at auction; that the defendant Hamilton purchased, among other things, a lot of wheat growing on the said Carter's farm, at \$9,75 per acre, represented to be 105 acres; for which the said note was given; and that an agreement was made at the sale, that the wheat should be afterwards measured, and the price vary as the acres should vary from 105; that it was afterwards measured and found to contain but 94 $\frac{1}{4}$ acres, and the defendant therefore claimed a deduction from the amount of the note, of \$99,93 by virtue of that agreement; and further, that the defendants had tendered \$52 damages and \$8 costs, soon after the commencement of the action, which it was not denied would be a sufficient tender, provided the defendants were entitled to a reduction of the note as claimed by them. It was proved that the wheat was sold by the auctioneer, while standing a few rods from it; that he stated that there were supposed to be 105 acres, and it would be sold subject to measurement, by the acre. Coe, the executor, testified that he did not know, or did not recollect, how the wheat was proclaimed; but after the sale he was informed that it was sold subject to measurement. After the sale, Hamilton the purchaser gave the note, with Scott as his surety. At the time of the sale, Coe supposed the wheat belonged to him as executor. He afterwards learned that it was the property of Mrs. Carter, the plaintiff, and on her paying him the balance of the note, over and above the price of the wheat at 105 acres, he transferred the note to her. She was ignorant of the terms stated by the auctioneer until after the sale had been completed.

The report of the referee was for the plaintiff, for the whole amount of the note, and from the judgment entered upon that report the defendants appealed.

A. Dann, for the appellant.

Wm. H. Kelsey, for the respondent.

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By the Court, TAYLOR, J. The principles of law, as applicable to cases bearing a resemblance to this, are well settled; and the reported decisions are very numerous. The only difficulty arises from the facts as governed by one principle of law, running into those applicable to another, with such slight shades of difference as sometimes to raise a doubt where the dividing line is found.

No principle can be better settled upon authority than this, that parol or extrinsic evidence, namely, is not, in general, receivable to contradict, vary or explain a written instrument. It would be inconvenient, say our old authorities, that matters in writing, made by advice, and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by averment of the parties, to be proved by the uncertain testimony of slippery memory. (5 *Coke*, 26 a.)

Although this rule was introduced and established when the practice prevailed, universally, of affixing the seal of the party to the written instrument, it has been applied, generally, to simple contracts in writing, to the same extent and with the same exceptions as to contracts under seal; and the reason is equally applicable to both, namely, that the solemn documentary contract is designed to be the repository and evidence of the *final* intentions of the parties: and in nearly every case which involves this question, it is affirmed that all oral negotiations or stipulations between the parties, which preceded or accompanied the execution of the instrument, are to be regarded as merged in it.

But there are classes of cases where the rejection of oral proof would be extremely unjust: as for instance, where there is ambiguity, either patent or latent; fraud or covin; and sometimes a particular usage to show the intent of the parties. And it has often been decided that the amount for which a note is made payable can not be varied by parol, except by showing want of consideration, fraud or mistake. (*Coven & Hill's Notes*, 976.)

In the present case there was neither fraud nor mistake: neither the executor nor the auctioneer made any affirmation or representation of which fraud could be predicated; nor was

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there any mistake in giving the note; or such a mistake as would authorize an interference of the court to correct it, on that ground.

The testimony either showed a failure of consideration, and for that purpose was admissible and proper, and should have secured a report in the defendant's favor, or it went to vary a written contract, and therefore was inadmissible.

The rule above referred to is directed against the admission of any other evidence of the language employed by the parties, in making the contract, than that which is furnished by the contract itself. No other words are to be added to it, nor substituted in its stead, and the duty of the court is, in all such cases, to ascertain, not what the parties may have secretly intended, as contradistinguished from what the words actually express; but what is the meaning of the words used in the writing. (4 B. & Ad. 771. 5 *Id.* 122 to 129. 2 *Chit. R.* 275. *Greenl. Ev.* 277.)

In this case the agreement in writing was that for value received the defendant promised to pay a certain sum of money. The defendant contends that the meaning of this promise was that he would pay that sum, provided the number of acres should equal 105. This was probably the meaning of the parties in their previous conversations—but no such proviso can be extracted from the written contract. The distinctions in such cases are sometimes subtle, and necessarily somewhat difficult of explanation: extrinsic parol testimony is certainly admitted, to prove a mistake, and this does vary the written contract: so too in several other contingencies.

I apprehend a simple rule will elucidate the principle in several of these cases. The party may, by oral or extrinsic evidence, prove a fact, which fact in law would be a sufficient answer to a part or the whole of the plaintiff's claim, provided that fact was not known to the parties or one of them, and was not a subject of negotiation between them either before or contemporaneously with the making of the contract; but he can not, in order to vary, contradict or explain such a contract, introduce oral and extrinsic evidence of any agreement by the parties, by

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parol, made either at the same time or before, affecting that contract.

A case somewhat analogous to this, is found in 2 *W. Black.* 1249, which was an action on a lease, providing for the payment of £26 per annum. On the trial the plaintiff offered to show, by parol evidence, that besides the £26, the defendant had agreed to pay £2 12s. 6d. a year, being the ground rent of the premises. The judge thought such evidence inadmissible, and nonsuited the plaintiff. A new trial was denied, and Blackstone, J. said, Here is a positive agreement that the tenant shall pay £26. Shall we admit proof that this means £28 12s. 6d.? (*See also Coke v. Guy*, 2 *B. & P.* 569; 1 *Day*, 23.)

The case cited by the defendants' counsel from 3 *Hill*, 171, was for damages by way of *recoupment*. In that case there was no dispute about the written contract. The note was given for a quantity of wood. The testimony showed a collateral engagement, relating to a distinct matter, to wit, an agreement in the nature of a warranty against subsequent loss by fire, resulting from the plaintiff's own act, and which undertaking might as well have been made by another as by the plaintiff. The court put the decision upon the ground that there was nothing in the case to alter, modify or impeach the contract.

However hard this case may operate upon the defendant, I think it clearly falls within the rule, excluding such evidence; and accordingly the report of the referee must be confirmed.

[MONROE GENERAL TERM, JUNE 3, 1851. *Selden, Johnson and Taylor, Justices.*]

LEWIS vs. SMITH.

Where the husband by his last will and testament appointed his wife executrix, and several other persons executors, only one of whom, with the wife, qualified, and the testator by his will gave to his wife all his real and personal estate during her life, and then added the following clause—"To carry the above into full effect, I empower the executors to make sale of the fast estate, and lodge the proceeds with the executrix, who is to enjoy the same during her life," it was *held* that the devise was not inconsistent with her claim for dower; that she was entitled to both the devise and her dower, and was not compelled to elect between such provision and her dower.

G. L., in 1826, gave a mortgage upon his real estate, in which his wife did not join. He had previously contracted to sell to the defendant, and other persons, various parcels of said land, and the contracts were included in the mortgage, and assigned to the mortgagee, with the moneys due and to grow due thereon. G. L. died in 1830, leaving a will, in which he made a provision for his wife, the plaintiff, not expressed to be in lieu of dower, and appointed her executrix, and several other persons executors. After the testator's death, the assignee of the mortgage, and several of the persons holding contracts of purchase, one of whom was the defendant in this suit, united and filed a bill in chancery against the widow and the devisees under the will, one of whom was the executor that had qualified, and served on the defendants in that suit a notice stating that the object of the suit was to foreclose the mortgage, and that they made no personal claim against the defendants, and in the bill filed by them they set forth the rights of the defendants under the will, and that the widow and one of the defendants had qualified as executrix and executor—and then set forth generally that the said defendants had, or claimed to have, some interest in the premises, as subsequent purchasers, incumbrancers, or otherwise; but made no mention of the widow's claiming dower, or any allegation in reference thereto, and the defendants suffered the bill to be taken as confessed, and a decree of sale was made in said suit, and that the purchaser be let into possession; and upon a sale being made under said decree, the assignee of the mortgage became the purchaser, and received a master's deed. In an action of ejectment, by the widow, to recover dower in the mortgaged premises; *Held* that the title acquired by the purchaser was subject to the widow's claim for dower; that her claim for dower was paramount to the mortgage, and that the decree and master's deed was no bar to such claim for dower; that the bill was not properly framed to enable the complainants to litigate her claim to dower in that suit; that as there was no allegation in the bill relative to her claiming dower, or that the devise under the will was in lieu of her dower, she was not a party to that suit as doweress, but only as executrix and devisee, and that her claim to dower, being paramount to the mortgage, was not the subject of litigation in that

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suit; and that, as to that claim, she would not have been a proper party to the suit.

The bar against all parties defendants, mentioned in the statute (2 R. S. 192, § 158) refers only to the proper parties to a foreclosure suit, viz. mortgagors and mortgagees, and subsequent incumbrancers, and to such rights as have been properly the subject of litigation in the foreclosure suit. It does not embrace paramount rights of parties which have not been subjected to litigation, by the form or substance of the pleadings in the case.

THIS was an action of ejectment for dower. The plaintiff was the widow of George Lewis, deceased, and claimed her dower in certain lands of which said Lewis died seised, in the town of Reading, in the county of Steuben, in the possession of the defendant, claiming to be owner. The defendant insisted that the plaintiff was barred of her dower in the premises, first by reason of a testamentary provision in her favor in the will of her husband, in lieu of dower, and second by reason of a decree in chancery against her in a certain suit, in which the plaintiff and defendant were both parties. From the evidence in the case, it appeared that George Lewis was the owner in fee of about 800 acres of land in said township. That on the 6th day of July, 1826, he executed a mortgage upon said lands to the president and directors of the Manhattan Company, to secure the payment to them of about \$3,000. That prior to that time Lewis had contracted to sell to the defendant 122 acres of said land, and also various other parcels to other individuals. These contracts were included in the mortgage, and assigned, with the moneys due and to grow due thereon. Lewis died in 1830, leaving a will, in which he left to the plaintiff all his real and personal estate during her life, and the remainder to William Elliott, and her two nephews, Thomas L. De Witt and George L. De Witt, at her death, but the nephews were not to be entitled to the possession and enjoyment until they should arrive at full age. Then followed this clause, "To carry the above into full effect, I empower the executors to make sale of the fast estate, and lodge the proceeds with the executrix, who is to enjoy the whole during her life, and then to be divided as before described, but it must be understood that there must be no division until the executrix finds it convenient, as the well ascertained debts

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must be first paid after the decease of my wife. The division must take place as tenants in common, and not as joint tenants." The plaintiff in this suit was appointed executrix by the will, and several other persons executors, only one of whom, William Elliott, qualified and took upon himself the execution of the same with the plaintiff. The testator, at the time of his death, owned real estate in the states of New-York, Pennsylvania and Ohio, and after his death, and previous to the proving of the will, the widow took possession of some of the lands in Pennsylvania, and told the executor who afterwards qualified that she would not take under the will, but would have her dower. After the will was proved she had a suit with said executor relative to her dower, in Pennsylvania, and received money for her dower in some of those lands. On the 15th of June, 1833, the said mortgage was assigned to James Pumpelly, and on the 16th of October, 1834, he filed his bill in the court of chancery to foreclose said mortgage, and for a sale of the mortgaged premises. The defendant in this suit, and the other persons holding contracts from George Lewis as aforesaid, united with said Pumpelly, as complainants in the bill, to the end that they might be enabled to pay up the purchase money due on their respective contracts and obtain conveyances. The plaintiff in this suit, William Elliott, Thomas H. De Witt, and George Lewis De Witt, were made parties defendants, and were duly served with process to appear and answer, and also at the same time with notice that no personal claim was made against them. The bill stated that the plaintiff was the wife of George Lewis, at his death. The provisions of the will, so far as the disposition of the property was concerned, and the directions in regard to it, were substantially set out in the bill of complaint, and it was alleged that the defendants therein named had "or claimed to have some interest in the mortgaged premises, as subsequent purchasers or incumbrancers, or otherwise," but what particular interest the complainant was not informed. The bill prayed that the executors and executrix might be decreed to pay the amount due upon said mortgage, and in default thereof, that the mortgaged premises might be sold, and all the defendants fore-

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closed of all equity of redemption and claim, of, in and to the said premises. The defendant did not appear, and a decree of foreclosure was taken pro confesso, directing a sale of the premises by a master, and that the purchaser, upon receiving the amounts due upon the contracts of sale respectively, should convey to the complainants, who held contracts under George Lewis. The said Pumpelly became purchaser, took a master's deed, and conveyed the premises in question to the defendant.

The present action was tried at the Steuben circuit in February, 1850, before Justice Johnson, without a jury. The judge at the circuit decided that the testamentary provision in favor of the plaintiff was not in lieu of dower, either by express terms or by necessary implication, so as to put her to her election; but that the decree in the foreclosure suit was conclusive against the plaintiff, and that the defendant was entitled to judgment. Judgment was rendered in favor of the defendant, upon this decision, and the plaintiff appealed to the general term.

H. H. Burlock, for the appellant.

John M. Parker, for the respondent.

By the Court, TAYLOR, J. The question whether the provision made by the will of Lewis for the complainant, was in lieu of dower, was disposed of by the judge at the special term, and as no appeal was taken from that part of his decree, it is unnecessary for me to take further notice of it.

The bill filed by Pumpelly and others, for foreclosure, made the complainant a party defendant, and she was stated in that bill to have been the wife of Lewis, the mortgagor. The complainant was made a defendant, as executrix and devisee under the last will and testament of George Lewis, her husband and the mortgagor, and after setting forth in the charging part of that bill her interest as such executrix and devisee, it goes on to state that Drusilla Lewis and others named, have, or claim to have, some interest in the mortgaged premises; as subsequent purchasers, incumbrancers or otherwise, without specifying any particular interest or claim. But in the whole bill there is no

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description of, or reference to, the interest or claim of the widow for dower. She was not made a party as doweress, but as devisee, and in the character of an executrix alone. I can not think that the paramount title of the widow can be cut off by such a proceeding, although she be nominally a party to the suit.

She is called upon to answer the matters set forth in the bill: she examines that bill, and finds that matters are particularly specified, in which she has an interest as executrix and devisee, but to which she has no answer to make. Relying upon the fact that the pleading which she is summoned to answer makes no mention of an interest, held in her own individual right as the widow of the mortgagor, I think she was not bound by any rule of equity pleading to answer those matters; but was justified in the belief that those interests of hers were not designed by the complainants to be brought into litigation in that suit, and this view of the case is fully sustained by that of *Bank of Orleans v. Flagg*, (3 Barb. Ch. Rep. 318,) where the chancellor says, "The bill in this cause was not properly framed. To enable them to litigate that question, instead of alledging falsely, that he had or claimed some interest in the premises, which had accrued subsequently to their mortgage, the bill should have stated that he claimed an interest, under a contract to purchase, prior to the mortgage;" or in other words, the bill should state the facts truly as they existed, so far at least as not to mislead the opposite party as to the object of the suit. This was purely a bill of foreclosure. Now it is a rule of equity, that no facts are properly in issue, unless charged in the bill; nor can relief be granted for matters not chargeable, for the court pronounces its decree *secundum allegata et probata*, (*Story's Eq. Pl.* 259; 3 *Wood.* § 55,) and they can pronounce upon nothing else. I am of opinion, that under this bill there was nothing alledged which called upon the complainant to interpose an answer setting forth her inchoate right of dower. (*Elliott v. Pell*, 1 *Paige*, 269.) The case of *McGown, et al. v. Yerks et al.* (6 *John. Ch.* 450,) did not, as I conceive, settle any question raised in this case. The purport of that decision was that all parties interested should be brought in, as a duty of the

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complainant, to the end that the sale may not be deceptive to the purchaser, but not that the rights of the prior incumbrance would be otherwise affected. In reference to the question now before us, the chancellor says, where the land is to be sold, it would be essential to all concerned, and necessary to prevent a sacrifice, that the value and extent of the prior incumbrance, *made known by the pleadings*, should be ascertained and declared. In this case no such incumbrance was made known by the pleadings, and if the omission was erroneous or improper, that was the fault of the complainants in the foreclosure suit. In the case of *Jackson v. Hoffman*, (9 *Cowen*, 271,) the remark of Sutherland, J. that the defendant, and those from whom he derived title, having been parties to the suit in chancery instituted for the foreclosure of the mortgage, were estopped from denying the title of any *bona fide* purchaser at the sale, under the decree of foreclosure, was perfectly correct. The defendants were not only parties to the suit, but were subsequent purchasers, and made parties as such. It would certainly then be improper for them to set up in an action of ejectment following a sale on the foreclosure suit, an equitable defense which might have been made in that former suit.

The doctrine as laid down in *Le Guen v. Gouverneur and Kemble*, (1 *John. Ca.* 436,) that the judgment or decree of a court possessing competent jurisdiction, shall be final as to the subject matter thereby determined, is well settled, though the correctness of the other branch of the opinion of Radcliffe, J. that it is not only final as to the matter actually determined, but as to every other matter which they neglect to litigate in the cause, and which the court might have decided, has with good reason been questioned. But admitting it to be correct, I still think it does not reach the case at bar, inasmuch as the court could not have decided any matters not brought before them, by proper charges in the bill. (*Elliott v. Pell*, 1 *Paige*, 269.) It is well settled that the mortgagee can not, in filing his bill for a foreclosure, make one claiming a paramount title adversely to that of the mortgagor, and prior to the mortgage, a defendant in the suit, for the purpose of contesting the validity

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of such adverse claim of title. (*Eagle Fire Co. v. Lent*, 6 *Paige*, 637.) It is a general rule that the proper parties in a foreclosure suit are the parties to the mortgage and subsequent incumbrancers, either under the mortgagor or mortgagee, and when prior incumbrancers are made parties, it is only that the amount of such incumbrances may be ascertained, to be paid out of the proceeds of the sale, or that the premises may be sold subject to such known incumbrance. (*Holcomb v. Holcomb, et al.* 2 *Barb. S. C. R.* 21.)

The right of dower was certainly a claim paramount to those of the complainants, either under the mortgage or the contracts, and they therefore could not call upon the widow to litigate that right with them in the foreclosure suit. Many cases show that such a suit could not be sustained. (2 *Schoales & Lefroy*, 199. *Hallett v. Hallett*, 2 *Paige*, 18. *Banks v. Walker*, 3 *Barb. Ch. Rep.* 408. 4 *Sandf.* 209.)

I do not see how the statute (2 *R. S.* 192, § 158,) cuts off the claim of dower. I am not able to perceive how the widow was individually a party to the foreclosure suit, so that a decree should abrogate her rights. She was not called into court in such capacity, but solely as executrix and devisee, and therefore was not a party to the suit, as litigant, on account of her dower. And besides, it would be an act of injustice which the statute never contemplated, for a decree in a chancery suit to cut off and abrogate paramount rights of parties, when those rights had not been subjected to litigation by the form or substance of the pleadings in the case. The bill in the foreclosure suit was so framed as to lead no one to suppose that the dower right of the widow would be called in question. I think the bar against the parties in the suit mentioned in the statute, refers, first, only to the proper parties—namely, mortgagors and mortgagees, and subsequent incumbrancers, and to such rights as have been properly the subject of litigation in the foreclosure suit.

I think the judgment of the court below must be reversed.

[MONROE GENERAL TERM, June 3, 1851. *Selden, Johnson and Taylor, Justices.*]

LA FARGE vs. HERTER and DILLENBACK.

Where a creditor, *with the knowledge and assent of a surety*, gives further time of payment to the principal debtor, on receiving a new security from him, such assent will take the case out of the rule, and the reason of the rule, by which sureties are held to be discharged by a dealing with the principal.

In this state equity recognizes and protects the relation and rights of a surety, after as well as before judgment. And the same rule extends to courts of law.

The right of subrogation, although originating in courts of equity, is now fully recognized as a legal right; and any act of the creditor which interferes with that right, and is a fraud upon it, operates to discharge the surety, as well at law as in equity.

In an action against one as surety, the suretiship being established, whatever would discharge the surety in equity will discharge him in a court of law.

The recovery of a joint judgment against principal and surety does not merge the suretiship of the surety, and render him a principal debtor.

Where, after the recovery of a judgment against principal and surety and a levy upon the property of the principal, the creditor took a bond and mortgage from the principal, for the amount of the judgment and in absolute payment thereof, and acknowledged satisfaction of the execution, by an indorsement thereon, and afterwards brought an action upon the judgment; *Held* that in such action the suretiship might be proved by evidence *aliunde*; and that such fact being established by the evidence, the circumstances constituted a defense to the surety.

Held also, that in such action upon the judgment, the plaintiff could not be allowed to prove that the bond and mortgage thus taken by him in satisfaction of the judgment were usurious and therefore uncollectable.

Held further, that the case would be different had the plaintiff attempted to foreclose the mortgage and the mortgagor had set up the usury. That might give to the plaintiff all the rights resulting from the invalidity of the bond and mortgage. But his remedy upon the judgment, even then, would only be revived against the mortgagor, and not against his co-defendant; whether the latter was a surety or not.

Where a creditor accepts from a debtor his bond, secured by a mortgage upon real estate, for the amount of a judgment and other demands, against the mortgagor, which bond and mortgage are intended and received as a payment of the judgment, the judgment will be deemed satisfied and extinguished, and no recovery can be had thereon.

THE plaintiff moved for a new trial, upon a bill of exceptions taken on the third trial of the cause. For reports of the case upon the former trials see 3 *Denio*, 157, and 4 *Barb. S. C. Rep.* 346. Upon the last trial the plaintiff proved the judgment, and

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the defendant proved the issuing of the execution and the settlement by the bond and mortgage of Herter, and the receipt of the plaintiff, as reported in 4 *Barbour* ; and he also proved, under objection, that Dillenback was the surety of Herter in the note upon which the judgment was recovered. The plaintiff proved by Dillenback that he, Dillenback, was present at the giving of the bond and mortgage to the plaintiff, and did not object to the arrangement, but assisted in the negotiation ; and offered to prove that the mortgage was usurious, and that he commenced proceedings to foreclose the same by advertisement, when Herter threatened and took steps to institute proceedings in equity to set aside the mortgage, for usury. Dillenback made an affidavit in such proceeding, and the plaintiff discontinued the advertisement and commenced this action. This evidence, upon objection being made, was excluded by the court, and the plaintiff excepted. The court decided that the plaintiff ought not to recover, and directed a verdict for the defendants ; to which the plaintiff excepted.

J. Clarke, for the plaintiff.

B. Bagley, for the defendants.

By the Court, ALLEN, J. The plaintiff moves for a new trial upon several exceptions taken at the trial, to the ruling and decision of the judge. I. The first exception upon which the plaintiff relies is to the admission of evidence that Dillenback was a surety for Herter in the note upon which the judgment, which is the foundation of this action, was recovered. The ground of the objection was that the suretiship was merged in the judgment, and that both defendants, by the recovery of the judgment, became principal debtors. And the counsel relies upon the decision of the court in this case, reported 3 *Denio*, 157, and *Hubbell v. Carpenter*, (2 *Barb. S. C. Rep.* 484.) It is not indispensable to the decision of this cause to decide this question. The decision at the circuit was not based upon the mere fact of suretiship and a dealing with the principal debtor

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to the prejudice of the surety. If it had been, the decision would have been clearly wrong, for the manifest reason that the dealing established by the evidence was with the knowledge and assent of the surety, which would take the case out of the rule, and the reason of the rule by which sureties are held to be discharged in such cases. (*Story's Eq. Jur.* §§ 324, 326. *Tyson v. Cox*, 1 *Tur. & Russell*, 395. *Gahn v. Niemcewicz*, 11 *Wend.* 317, 325. *Greely v. Dow*, 2 *Met.* 176. *Combs v. Woolf*, 8 *Bing.* 136. *Rees v. Benington*, 2 *Ves. jun.* 540.) The final decision of the cause was upon the whole case, and may be sustained upon the ground that the judgment was paid by the bond and mortgage of Herter. But with a view to establish the intent of the parties, to give character to the transaction, and show that it was understood and designed that the judgment should be merged in and satisfied by the new security, it was highly proper to show the relation of the parties, and that the debt was the proper debt of Herter; whether the technical relation of principal and surety subsisted between the debtors, as against the plaintiff, or not. And the force and effect of this evidence, in this view, will be considered in connection with another point in the cause. If, however, Dillenback was technically the surety of Herter for the payment of the debt, notwithstanding the judgment, then most clearly the judgment was satisfied and paid by the bond and mortgage. An execution had been issued upon the judgment, and levied upon the property of Herter, the principal debtor, and that was released and the execution indorsed satisfied, upon the giving of the new security for this and other debts of Herter. And after the consummation of the arrangement the plaintiff told Dillenback that he was then "out," that is, that the judgment was satisfied and he relieved from his liability. The surety had a right to treat this as a satisfaction of the judgment. It was so treated by the plaintiff, and it would be unjust now to suffer him to recall his words and revoke and annul the transaction, to the prejudice of the surety. (*Baker v. Briggs*, 8 *Pick.* 122. *Carpenter v. King*, 9 *Met.* 511.) Was the relation, then, of principal and surety between the judgment debtors merged in

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the judgment, or did it continue as before? Did we suppose that this question had received that full and deliberate consideration to which it is entitled, when this case was before the late supreme court, we should feel bound to follow the decision of that court as reported in 3 *Denio*, but we are assured that this point, if in fact made by counsel upon the argument, was not considered or argued by them, and was passed upon by the learned judge without that mature deliberation and thorough examination which he was accustomed to bestow upon causes before him, and upon the supposed authority and analogy of the cases cited by him in his opinion. Even under these circumstances we venture to differ with that court with great diffidence, and would not do so if we were not, upon a full examination, constrained to believe that the decision is very clearly wrong, and one which would not have been pronounced by that tribunal except in a great press of business, and without a full investigation. In *Storms v. Thorn*, (3 *Barb. S. C. Rep.* 314,) I came to the conclusion that in equity the relation of suretiship existed, notwithstanding the recovery of a joint judgment against the debtors; and in my opinion in that case I briefly examined the cases referred to and relied upon by Beardsley, J. in 3 *Denio*, except those of *Pole v. Ford*, (2 *Chit. Rep.* 125,) and *Findlay v. Bank of the United States*, (2 *McLean's Rep.* 44.) In *Pole v. Ford*, the defendant, against whom a judgment had been recovered as drawer of a bill of exchange, moved that satisfaction of the judgment be entered, on the ground that judgment had been recovered against the drawer upon the same bill, and upon the latter judgment an execution had been sued out and levied upon the goods of the drawer and afterwards waived and time given to him. The motion was denied; the court determining that the rule that giving indulgence to an acceptor, without the consent of the drawer, discharges such drawer, did not apply after judgment. No reason is assigned. This case was followed in *Bray v. Manson*, (8 *M. & W.* 668,) not as settling the principle that the relation of principal and surety was merged in the judgment, but as an authority that the court would not interfere in such case upon affidavit; and *Park, B.*

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held there could be no relief unless there was a remedy in equity, which he did not decide, and does not appear to have considered as settled adversely to the surety by *Pole v. Ford*. It is, perhaps, proper to say in this place that the courts of this state have not, in all respects, followed the decisions of the English courts, and particularly the earlier decisions, relating to the rights, liabilities and duties of sureties, and that our own decisions have been more favorable in some respects to sureties than the earlier decisions of the English courts. But the case of *Findlay v. Bank of United States*, is directly in point to sustain the decision of this case in 3 *Denio*; for if the suretiship is merged by the judgment, so that no relief can be had in equity for causes which, before judgment, would have operated to discharge the surety, it follows that such matters would not avail the surety at law. In the protection of sureties law has followed equity, rather than equity the law. Courts at law have, from time to time, authorized and sustained defenses which have been held in courts of equity to entitle the surety to relief, in order to avoid the necessity of invoking the aid of the latter court. This case is reviewed by Harris, J. in *Hubbell v. Carpenter*, (5 *Barb. S. C. Rep.* 520,) in connection with the doctrine as applicable to courts of equity. In addition to the comments of Judge Harris, it may be remarked, that Judge McLean concedes the principle that the relation of principal and surety exists after judgment, and overthrows, to some extent, his own reasoning, by conceding as he does that the surety has an equity remaining in his favor as surety, and as an incident to that relation after the judgment, in the right of substitution on the payment by him of the judgment. Now it is this right of substitution—a right of subrogation to all the rights and remedies of the creditor against the principal debtor—that entitles the surety to relief on account of dealings with the debtor in derogation of these rights. So long as that equitable right exists, so long they are the subjects of fraudulent interference by the creditor, and the suretiship of the party is necessarily recognized. The recognition of the equitable right concedes the relation to which that right attaches, and places

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the party under the protection of the court, in virtue of the character to which the right is incident. Will it be said that an equitable right exists, and yet that courts of equity will not recognize it and protect it, and that upon the merest technicality imaginable? I think not. The right of subrogation is but an equitable right upon judgment, recognized for certain purposes by courts of law, and after judgment Judge McLean concedes the same equitable right to exist. Why, then, do not the same relative duties and obligations exist which before judgment are incident to that right, viz. the duty and obligation of the creditor to forbear the doing of any act which will interfere with this right? I am unable to see. That in this state equity would recognize and protect the relation and rights of the surety after as well as before judgment, I think there can be no reasonable doubt. (*See Curran v. Collect*, 3 *Kelly*, 239; *Brown v. Riggins*, *Id.* 405; *Bank of Ireland v. Beresford*, 6 *Dow*. 233; *Mayhew v. Crickett*, 2 *Swanst.* 198.) Does the same rule extend to courts of law, or shall a party be driven to a court of equity to enforce his rights? The right of subrogation, although originating in courts of equity, is now fully recognized as a legal right, and any act of the creditor which interferes with that right, and is a fraud upon it, operates to discharge the surety, as well at law as in equity; and if the right of subrogation is admitted to exist after judgment, then all the legal consequences must attach to an infringement of that right. (*See Parsons v. Briddock*, 2 *Vern.* 608.) In *Wayne v. Keely*, (2 *Bailey*, 551,) the court held that in an action against one as surety, the suretiship being established, whatever would discharge the surety in equity would discharge him in a court of law. And this appears to be the effect of the decisions in the leading cases in this country. (*See Niblo v. Clarke*, 3 *Wend.* 24; 6 *Id.* 236; *Fleming v. Gilbert*, 3 *John.* 528.) The decisions in the English courts have not been in accordance with this principle, and have not been uniform upon this point. (*See Orme v. Young*, 1 *Holt*, 34; *Laxton v. Peat*, 2 *Camp.* 185; *Fentum v. Pocock*, 5 *Taunt.* 192; *Price v. Edmunds*, 10 *B. & C.* 578; *Ashbee v. Pidduck*, 1 *M. & W.* 564; *Bell*

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v. *Banks*, 3 *Scott's N. R.* 503.) The principle of *Fentum v. Pocock*, and *Price v. Edmunds*, conflicts with the decisions of the courts of this state in *Suydam v. Westfall*, (4 *Hill*, 211;) *Griffith v. Reed*, (21 *Wend.* 502,) and *Wing v. Terry*, (5 *Hill*, 160.) And see *Harris v. Brooks*, (21 *Pick.* 195.) That the courts in England are disposed to depart somewhat from the narrow limits within which they have been confined by the decisions based solely upon the technical rules of the common law, and apply the doctrines of equity to actions against sureties, see *Stone v. Compton*, (5 *Bing. N. C.* 142, per *Tindal, C. J.*) If a surety can in any case avail himself, in an action at law, of a defense based upon a violation of his equitable right of subrogation or other rights incident to his character as surety, why not in all cases; and if not in all cases, where shall the line be drawn excluding some and admitting other defenses of that character? The principle once established, that an act of the creditor to the injury of the surety operates in his discharge at law, in any case, all cases within the principle must be decided by it. There may be cases in which a party may be driven to a court of equity, for the reason that the forms of procedure in courts of law are not adapted to the relief. But these are cases in which the surety seeking the relief is the actor and calls the creditor into court. In such case the only relief in a court of law would be after judgment, and by motion, and the court would not, perhaps, following the case of *Pole v. Ford*, interfere upon affidavit. But the case is different where the creditor comes into the court as plaintiff. In such case the surety should be permitted to avail himself at law of any defense which, by the established rules of law, would entitle him to an unconditional discharge in courts of equity. Where there is nothing addressed to the discretion of the court, the rules by which the two courts are governed, in adjudicating upon the rights of parties, are the same. In *Commonwealth v. Miller*, (8 *S. & R.* 452,) which was a *scire facias* upon a judgment against a sheriff and his sureties, it was held that a dealing by the creditor with the principal, by way of indulgence, to the injury of the sureties, although after judgment,

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discharged them, and constituted a defense to the action. (See also *Lichtenthaler v. Thompson*, 13 *Serg. & R.* 157; and *The Commonwealth v. Haas*, 16 *Id.* 252; *Dixon v. Ewing*, 3 *Hammond*, 280; *Mayhew v. Crickett*, 2 *Swanst.* 193; *Bank of Steubenville v. Leavitt*, 5 *Ham.* 207.) *Carpenter v. King*, (9 *Met.* 511,) is decisive of this case and of every question in it, if it is to be followed by us. The court in that case held, and the ruling is sustained by a well reasoned opinion of Shaw, C. J., 1. That when two persons jointly or jointly and severally sign an obligation for the payment of money, one of them may show by evidence aliunde that he was surety for the other. 2. In an action of debt on judgment, brought against a surviving debtor who signed the obligation on which the judgment was rendered, either jointly or jointly and severally with the other judgment debtor, he may show by evidence aliunde that he signed that obligation as surety for the other debtor; and 3. That if a creditor informs a surety that the debt is paid, and the surety afterwards relinquishes security which was given him by the principal, this is a good defense to an action brought by the creditor against the surety, though the creditor did not intend to deceive or mislead him. It is true that in this case the surety did not relinquish any security which had been given to him by the principal debtor, but the property of the debtor was released from the levy upon the execution, and which, but for this arrangement, would have enured to the benefit of the surety, and he was told by the plaintiff that the judgment was satisfied, and he had a right to and did rely upon such representation. (See also *Potts v. Nathan*, 1 *W. & S.* 155; *Carpenter v. Derow*, 6 *Alab. Rep.* 710, and *The Commercial Bank v. The Western Reserve Bank*, 11 *Ohio Rep.* 144.) Upon the authority of these cases, as well as upon the reason of the rule by which the rights of sureties are recognized and protected in courts of law, we are of the opinion that the suretiship of Dillenback was not merged in the judgment, and that in this action it was properly shown by evidence aliunde, and that being proved, the facts established by the evidence constituted a defense to him in this action.

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II. The next question presented by the bill of exceptions arises upon the offer of the plaintiff to prove that the bond and mortgage, taken by him as is alledged in payment of the judgment, was tainted by usury, and the exclusion of the evidence by the justice. The usury alledged by the plaintiff could not exist against the will, or without the voluntary assent of the plaintiff. The reservation of a greater rate of interest than that allowed by law, by mistake and without design on the part of the creditor, would not constitute usury. A corrupt agreement is necessary; and the intent enters into and forms an essential ingredient in the facts going to establish the offense. The plaintiff then seeks to establish his own corrupt and illegal agreement, upon which to base his right to recover in this action. The victim of the usurer is allowed to do this by law, upon principles of public policy. It is because he is the victim and not a voluntary actor in the illegal transaction. But this reason does not apply to the usurer, and there appears to be no good reason why he should not, upon well established principles, be precluded from giving evidence of his own illegal acts. If the taking of the bond and mortgage would, but for the usury, be a satisfaction of the judgment, he ought not to be permitted to say that in taking that security he violated the laws of the land and therefore the judgment was not satisfied. The legality of his acts should, as against him, be presumed, and he should be estopped from alledging against this presumption. It is true the plaintiff does not base his action directly upon the bond and mortgage, which, if they are usurious he could not sustain, but upon a cause of action which has been merged in and satisfied by such bond and mortgage, unless by reason of the immoral and illegal act of the plaintiff himself the latter securities are nullities. It is indirectly an attempt to evade the principle that *ex turpi causa non oritur actio*. As a general rule, a party to a fraud is estopped from setting it up as a defense; with this qualification, however, that when the plaintiff alledges the fraud, and proves it as a part of his own case, there is no rule of law which can prevent the defendant from taking all the benefit as well as incurring all the disadvantages which may result from such a

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state of things. Applying this principle to this case, the plaintiff should be estopped from alledging his own cupidity and fraud. The case would be different had he attempted to foreclose the mortgage and the mortgagor had set up the usury. That might, within the principle, give to the plaintiff all the rights resulting from the invalidity of the bond and mortgage, and it is upon this principle that the cases relied upon by the plaintiff proceed. But in that case I apprehend the remedy of the plaintiff upon the judgment could only be revived against the mortgagor and not against the other defendant, whether he was a surety or not. We adhere, upon this question, to the opinion expressed in this cause on a former occasion and reported in 4 *Barb. S. C. Rep.* 346. In *Hughes v. Wheeler*, (8 *Cowen*, 77,) the plaintiff brought an action upon a note which had been given to take up a prior note, and the defendant set up the defense of usury. The court say that the plaintiff may upon the common counts recover the consideration of the note, so far as it was not affected by the usury, and that consideration was the original note. The plaintiff did not in that case, in an action directly upon the original note, seek to establish the usury in the second note. The usury was proved by the party for whose benefit the statute against usury was passed and to whom the right to set it up was secured. The same principle was followed in *Rice v. Willing*, (5 *Wend.* 595.) The decision in *Dix v. Van Wyck*, (2 *Hill*, 522,) is to the effect that usurious contracts, notwithstanding the words of the act, are merely voidable at the instance of the borrower or some one in legal privity with him, and that they may be ratified and performed; that they are not void, and can not be avoided by a stranger. In *Crippen v. Heermance*, (9 *Paige*, 211,) the chancellor held that upon a bill filed to foreclose a mortgage given for purchase money, to which the defendant interposed the defense of usury, which was established, the plaintiff was entitled to a decree for the amount due upon the contract for the land at the time the mortgage was given, as an equitable lien upon the premises. This was doubtless right, upon the principle alluded to, if the bill was framed as it doubtless was, so as to present the case upon which the plaintiff finally had

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relief. It will be seen that in this action at law the plaintiff has not counted and could not have counted so as to entitle himself to relief in the alternative. In *Crippen v. Heermance*, as in the other cases cited, the allegation of usury came from the party protected by the statute. We are also referred to the remarks of Justices Bronson and Jewett in *Vilas v. Jones*, (1 *Comst.* 274.) But the remarks of those judges in that case, even if necessary to the decision, would not affect the question now before us. In that case the surety, in establishing the contract by which he claimed to be exonerated, necessarily proved the consideration; for, without a consideration the agreement to extend the time of payment was invalid, and in showing the consideration established the fact that it was one not allowed by law; or in other words, that there was no sufficient consideration to support the agreement. And such were the cases cited by Bronson, J. from *B. Monroe's Reports*. But not so in this case. The mortgage being under seal is evidence of a consideration, and none but the mortgagor or some one in privity with him, can alledge the consideration to be usurious. It can not be known that he will choose to avoid the mortgage for that reason. In *Miller v. Kerr*, (1 *Bailey*, 4,) it was held that the usurer could not prove a security taken by him to be usurious, for the purpose of enabling him to resort to a prior obligation which was the consideration of the usurious agreement; and we think this decision consistent with good morals and with reason and authority. There is no estoppel in the case. Especially as against Dillenback is there no estoppel. There is no allegation of a fact by either of the defendants which was unknown to the plaintiff, and upon the faith of which the latter acted, which should now preclude the defendant from speaking the truth. But it is not a question of evidence or estoppel: it is upon the right of the plaintiff to alledge the fact in this action, and we are of the opinion that the evidence was properly excluded.

III. The next and remaining exception is to the ruling of the judge at the close of the evidence, and upon the whole case. The judge ruled that the plaintiff ought not to recover against Dillenback, and directed a verdict in favor of the defendants.

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1. If Dillenback was a surety for Herter, then the judgment was, as against him, satisfied, and the plaintiff was not entitled to recover. The plaintiff had taken other security from Herter for this and other debts, professedly in satisfaction, not collaterally but in absolute payment. He had so said by his receipt and the indorsement of his attorney on the execution, and by his release of the property of Herter from the levy, and his remark to Dillenback. But for this act of the plaintiff the execution would have been levied of the property of the principal debtor, and the surety discharged. *Non constat* that the surety would have assented to a discharge of the property of his principal debtor from the execution and to continue liable for an indefinite time. 2. If the suretiship is merged in the judgment, I think the same result must follow. In Pennsylvania it has been so decided. The courts of that state have held in *The Commonwealth v. Haas*, (16 *Serg. & Rawle*, 252,) that even when both judgment debtors are primarily bound, a discharge by the plaintiff of the property of one of the joint debtors from a levy upon execution discharged the other. (See also *Same v. Miller*, 8 *Id.* 452; *Dixon v. Ewing*, 3 *Ham.* 280.) The plaintiff assumes to deal with and treat one as the sole debtor, and to look to him alone, by taking new securities from him and releasing those by which the joint debt is secured. The debtor who has given his security and procured a discharge of the joint debt, has the right to call upon his co-debtor for contribution in cases where contribution upon payment is allowable. 3. But lastly, the bond and mortgage of Herter, for the amount of the judgment and other demands, were intended and received as a payment of the judgment. The judge was not requested to submit any question of fact to the jury. By his silence upon that subject the plaintiff's counsel conceded that the court properly took upon itself the decision of that question and the final disposition of the cause. Indeed there were no disputed facts. The only dispute was as to a conclusion of law from the facts proved. The facts proved were 1. The recovery of the judgment; 2. The issuing of an execution thereon and a levy upon the property of Herter; 3. The giving of the bond and mortgage of Herter for

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an amount larger than and including the debt due to the plaintiff; 4. The receipt of the plaintiff for that amount as paid; 5. The payment of the costs to the plaintiff's attorney; 6. The indorsement of the execution satisfied, by the plaintiff's attorney; and 7. The release of the property from the execution, and the declaration of the plaintiff to Dillenback, in substance that the judgment was satisfied. In opposition to these facts no circumstances were given in evidence tending to show that the intention of the parties was other than that clearly expressed by their acts and their written and oral declarations. There was then no question of intent to be submitted to the jury, had the plaintiff then requested it and laid the foundation for the point which he now makes upon this branch of the case. The jury would not have been authorized upon the evidence to find a different intent of the parties and that the bond and mortgage were not received in payment of the judgment. It is not necessary to review the cases bearing upon the question of payment, in cases like the present. Most if not all the cases in which a question of this kind has been made have been cases in which the failure of the creditor to realize his debt from the substituted securities has arisen from no act or default of his own, but from some defect in the security of which he was ignorant, or from some contingency beyond his control, and which was unlooked for and unprovided for, and are therefore in principle not strictly applicable to this case. The leading cases are examined and reviewed by Lott, senator, in *Waydell v. Luer*, (3 Denio, 410,) and the rule deduced from them that the giving of a promissory note for a copartnership debt by one of several partners individually after the dissolution of the copartnership, under an agreement by the creditor to accept it in payment of the debt, extinguishes the liability of the other copartners. The opinion of Senator Lott was concurred in by Gardiner, president, and they, together with seven other of the twelve senators who concurred in pronouncing judgment in the cause, I infer adopted the reasoning and conclusions of Mr. Lott on that occasion. I so infer for the reason that the other three senators voting with the majority of the court state their reasons for doing so, and in what respect they

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differ from their brethren while agreeing in the result. We adopt the conclusions of Senator Lott as the law of the land, for the reason that we suppose they were adopted and settled by the court of last resort in the state, and also because we think them abundantly fortified by authority and by the reasoning of the learned senator. And if that case was rightly decided upon the ground already stated, then beyond all question this case was properly disposed of. The plaintiff not only received the obligation of one of the debtors, and that the principal debtor, but that was secured by a mortgage upon real estate, and the other debtor, who was and was known to be a mere surety, was told that he "was out," that is, no longer liable upon the judgment, and was thus induced to suppose that the judgment was in truth satisfied and paid. But the ruling and decision in this case can be sustained upon principles conceded to be well established by every senator taking part in the decision of *Waydell v. Luer*. Those who dissented from the decision in the cause concede that if additional security should be given, that would be a good consideration for an agreement to accept of the substituted security in satisfaction of the primary obligation. (*Per Porter, senator, p. 422.*) In this case the intent, understanding and agreement of the parties is beyond all question, and the consideration is abundant, to wit, the mortgage upon real estate to secure not only this debt but other debts which were not before secured, and for aught that appears were insecure. Senators Tallcott, Hand and Johnson place the decision of the case referred to upon the ground that there was some evidence that a note of a third person had been delivered in satisfaction of a part of the partnership debt, while the note of one of the partners had been given for the residue; and if so, that the original debt was discharged. If they were right, then in this case the plaintiff can not recover upon the judgment. It is satisfied and paid by the new securities for this and other debts. The plaintiff can not be permitted to hold the bond and mortgage as he does for the debts other than the judgment, and resort to the judgment for the amount covered by it. Probably he could not have obtained the security for his other debts, had he not

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consented to include the judgment and to give a day of payment for the whole. The debts are merged and have become one debt, secured by the mortgage. Again; Dillenback may well insist, upon the evidence, that the plaintiff is estopped from alledging that the judgment was not paid. It is unnecessary to consider at length either this suggestion or the other point made by the defendants' counsel, that the bond and mortgage were in any view taken as payment *sub modo*, and that the plaintiff must first resort to them, and exhaust his remedy thereon before he could resort to his original cause of action: for the reason that the other grounds, we think, are fatal to the plaintiff. Among the cases however, which may be referred to upon these points, are the following: *Dezell v. Odell*, (3 *Hill*, 215;) 4 *Barb. S. C. Rep.* 358, and cases cited.

The motion for a new trial is denied.

[ONONDAGA GENERAL TERM, November 4, 1860. *Gridley, Allen and Hubbard*, Justices.]

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After a sale of lands upon execution, by a sheriff, and the execution of a conveyance to the purchaser, extrinsic evidence can not be resorted to in order to establish the intent of the sheriff in making the sale. It is not like the case of a deed *inter partes*; and the rules applicable to such cases do not apply.

Deeds of bargain and sale between man and man may, to some extent, be explained, by showing the intent of the parties; and in some cases if the deed, by reason of fraud or mistake, fails to express the true intent, it may be reformed, and made to express such intent. But a deed of a sheriff can not thus be reformed. If it follows the notice and certificate of sale it can not be in any respect varied, for any reason, or made operative except according to its terms. The inquiry into the intent of the sheriff, must be restricted to the terms used, and to the intent which the language of the instrument expresses.

Extrinsic circumstances may be resorted to, to explain the terms used in a sheriff's deed, and to locate the premises described therein. But they can only be allowed for the purpose of establishing and carrying out the intent express-

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ed in the deed, and not an intent which the terms of the deed fail to express.

If, in a deed, there are certain particulars once sufficiently ascertained, which designate the thing intended to be granted, the addition of a circumstance false or mistaken will not frustrate the grant. If there is a certain description of the premises conveyed, and a further description is added, it is immaterial whether the superadded description be true or false.

Where land is conveyed by a sheriff, upon a sale by him on execution, and two distinct parcels of land are found equally answering the description contained in the deed, the conveyance will be held inoperative, for the reason that it was intended to pass but one, and it can not be determined which was intended.

If a parcel of land exists in which the judgment debtor had an interest liable to levy and sale on execution, and which in every particular answers the description of the premises sold, no part which is necessary to a perfect description will be rejected as surplusage, so as to embrace a distinct or different parcel of land, to the exclusion of the one accurately described.

Where a deed, in describing the premises conveyed, bounds them on one side by lands mentioned as owned by another person—speaking in the present tense—when in fact there is, at the date of the deed, no land owned by such person, in that place, the land *recently* owned by him will be intended, and the deed should receive this construction *ut res magis valeat quam pereat*.

Nothing will pass at a sheriff's sale but what is then known and promulgated. A sheriff's deed described the land intended to be conveyed as "bounded on the west by the highway leading from A. P.'s to the Erie canal, east by land occupied by J. B. and south by land owned by P. F. W." The premises in dispute were once owned by P. F. W. but were not bounded on the south by any lands that were or ever had been owned by him. But directly north of, and adjoining the premises in dispute, was another parcel of land answering the description in the sheriff's deed in every respect, and in which the judgment debtor had, at the time, an interest in right of his wife, liable to be sold on execution. *Held*, 1. that the deed did not embrace the premises in dispute; but that it did include the parcel lying on the north.

2. That if the latter parcel was not included in the deed, then the deed was void for uncertainty.
3. That in the construction of the sheriff's deed every part of the description must be read and satisfied with reasonable certainty, and that no part of it could be rejected for its falsity.

THIS was an action to recover the possession of real estate. The complaint alleged that the plaintiff was the owner in fee of a part of lot No. 55 in Brutus, Cayuga county; and that while the plaintiff was the owner thereof the defendant entered

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into the possession of the premises and ejected the plaintiff therefrom. The answer of the defendant specifically denied all the allegations of the complaint, and alledged that one Christopher Edee was the owner of the premises on or about the 3d day of May, 1842, and that on or about that time a judgment was obtained in the supreme court of this state in favor of John Bennett against Edee which became a lien upon the premises in question. That an execution was issued on said judgment to the sheriff of the county of Cayuga, by virtue of which said premises were, on the second day of December, 1842, sold by said sheriff at public auction. That Bennett became the purchaser on said sale, and assigned his certificate of sale to George Passage on the 29th day of August, 1848, to whom the sheriff of said county, on or about the sixth day of September, 1848, executed and delivered a deed of said premises. That the defendant entered into the possession of the premises under and by virtue of an agreement with Geo. Passage. That if the plaintiff had any claim of title it was derived from said Christopher Edee, and that the conveyance from Edee to the plaintiff or to those under whom he claimed was made to evade the operation of said judgment, of which the plaintiff had notice, and for the purpose of hindering, delaying and defrauding the creditors of Christopher Edee. The reply denied each and every allegation of new matter contained in the answer.

The cause was referred to a sole referee, for hearing and decision. On the trial before him John J. B. Rude was examined as a witness on the part of the plaintiff, and testified that he was acquainted with the premises mentioned and described in the complaint. That on the 19th day of March, A. D. 1849, and ever since then until three or four weeks previous to the trial, the defendant was in the possession of said premises. The counsel for the plaintiff then introduced in evidence the following deeds of conveyance, comprehending the premises mentioned in the complaint, to wit: 1st. A deed from Samuel Wilson and wife to Phineas F. Wilson, dated 25th of August, 1836, conveying eleven acres of land, including the premises in question. 2d. A deed from Phineas F. Wilson and wife to Christopher

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Edee, dated December 30th, 1837, conveying three and $\frac{17}{100}$ ths acres of land, including the premises in question. The above mentioned two deeds had not been recorded. 3d. A deed from Christopher Edee to Conrod Edee, dated September 10th, 1839, recorded September 27th, 1848, expressing a consideration of three hundred dollars, and conveying all the right and title of Christopher Edee in lot 55, Brutus. This deed covered the premises in question, and more besides. 4th. A deed from Conrod Edee to the plaintiff, dated October 2d, 1848, recorded October 5, 1848, conveying said premises in question. The consideration expressed in the last mentioned deed was \$240. The foregoing deeds were all deeds in fee, with covenants of warranty. Said Rude further testified that he had known the premises thirty years; that when he first knew them they were woods. (It was here admitted that both parties claimed title under Christopher Edee.) That Christopher Edee took possession immediately after P. F. Wilson, and remained in possession until about one year ago or less.

The counsel for the plaintiff then offered to prove, by showing the declarations of Christopher Edee while in possession, the character of the possession of Edee, to wit; that he held it as tenant at will, under Conrod Edee. To which the counsel for the defendant objected. The objection was sustained by the referee, and the counsel for the plaintiff excepted to the decision. Witness testified that the value of the premises on the 2d day of April last, was \$50 per acre. The counsel for the plaintiff here rested, and the counsel for the defendant first introduced in evidence an exemplified copy of a judgment recovered in the supreme court of this state in favor of John Bennett against Nicholas Piper and Christopher Edee for \$277,93, signed May 3d, 1842. Filed May 9th, 1842, and then docketed. The suit in which said judgment was rendered, was on a promissory note, dated June 1st, 1826, payable in one year after date. Said counsel then produced in evidence the original execution issued on said judgment, tested on the first Monday in July, 1842, and returnable on the third Monday in October then next, directed to the sheriff of the county of Cayuga, and which execution

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was indorsed with a direction to the sheriff to levy and collect \$277,93 and interest thereon from May 9th, 1842, and his fees. Said execution had not been returned by said sheriff, nor any indorsement or note of a levy or return made thereon by him. John S. Everts was then called and examined as a witness on the part of the defendant, and testified that George H. Carr was sheriff of the county of Cayuga in 1842—that he was one of his deputies, and as such received the execution produced, and made a levy under it, on the premises in question, and advertised them for sale regularly, and sold them on the second day of December, A. D. 1842. John Bennett (the plaintiff) bid them off—that he, the witness gave to the purchaser and filed in the clerk's office of said county, a certificate of sale. Said certificate was then produced and read in evidence, and described the premises sold by the sheriff, as follows: "All that certain piece or tract of land situate, lying and being in the town of Brutus, and county of Cayuga, on lot number fifty-five, bounded on the west by the highway as leading from Anna Passage's to the Erie Canal, east by land occupied by Joshua Bishop, and south by land owned by P. F. Wilson; containing about two acres of land, be the same more or less. Also one other piece of land situate, lying and being on lot number fifty-six, in said town, bounded on the east by the highway, north by Joshua Bishop's, and west and south by land owned by George Passage, and is the same place the said Edee now resides on, containing about a half an acre of land, be the same more or less." The counsel for the defendant then produced and read in evidence, an assignment of said certificate by said Bennett to George Passage, dated August 29th, 1848. Said Everts was then cross-examined by the counsel for the plaintiff, and testified as follows: "I went on the premises—can't say whether I took the description of the premises from a deed or not—think that I got the description from Joshua Bishop, but am not sure. The boundaries of the premises were the same in the advertisement of sale as in the certificate of sale. I can not tell where the land of P. F. Wilson is that is mentioned in the description of lands sold by me. I meant to sell all the lands that Christopher Edee

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owned. Question. Do you know where the land spoken of as P. F. Wilson's land, in the certificate, is? Objected to by the defendant's counsel as immaterial, and objection overruled, and the defendant excepted. Answer. I can not say that I do. I know where the land of P. F. Wilson was at the time, for it was pointed out to me as I stood in the road that leads from the widow Passage's to the canal, on the height of ground near Bishop's where I could see the whole of it. Could see the whole premises on both sides of the road. I can not say which side of the road, whether north or south of it, the land lay which was pointed out to me as P. F. Wilson's. I have not read the complaint in this action, or heard it read. I have no certain knowledge that the premises described and claimed in the complaint, or any part of them, are included in the description of the premises mentioned in the certificate, but I always supposed they were. The plaintiff in the execution bid off the premises." Said witness further testified, that at the time of the sale he did not know who occupied the premises excepted in the complaint—thought there was a house on it occupied by Stephen Mead. That he had not read, heard read nor knew, the contents of the complaint in this action. The defendant's counsel then read the complaint to said witness and re-examined him, and he testified: "I went to see the premises when I had the execution, and stood in the road where I could see the whole of the premises. I have heard the description read in the complaint and those premises I sold." The counsel for the defendant then read to the witness the description of the premises in the certificate of sale, and after reading it asked the witness, "are the premises in this description and in the complaint the same premises?" After hearing both descriptions read, the witness answered they were the same premises. Said witness was then by the counsel for the plaintiff cross-examined again, who asked him the following questions, to wit: "Do you know where the lands mentioned in the complaint as occupied by David Passage are? Answer. They are on the south side of the road leading from Weedsport to Jordan. Question. Is any part of them on the north? Answer. He has none on the north side that I ever saw him

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occupy. Question. Do you know where the land is situate, mentioned in the complaint, as being conveyed by George Passage to Margaret Edee? Answer. Before reflection I should think it was the land Christopher Edee lived on, but can not say without looking at the description. Question. Can you say on which side of the road running from Anna Passage's to the Erie canal it lies, on the east or on the west side? After examining the description, the witness answered that he should think they were on the east side of the road from the premises on which Christopher Edee resided, and opposite in the corner. The lands mentioned in the certificate were sold by me at Crandall's. What description did you read to the bidders?" Objected to by the defendant's counsel, and the objection sustained. Decision excepted to by the plaintiff's counsel. "Have you any knowledge of lands lying near the premises in question, which Phineas F. Wilson owned and occupied? Answer. Only by hearsay. Question. Do you know of P. F. Wilson's ever owning or occupying any land south of any portion of the premises in question, and south of the road running east and west? Answer. I never knew of his owning or occupying any land except as described to me by Bishop, as I took it lying between the roads. It has been so long since I had the description from Bishop, I do not remember. Question. Can you say whereabouts in this three cornered piece between the roads, this land spoken of as owned by Wilson, lay? Answer. On the south side as I understood it, but can't say as it run clear through the acre to the road running past Anna Passage's. I took it to be a part of the three cornered piece. Question. In speaking of the south bounds of the lands in the certificate, do you understand that as being the north bounds of the Wilson land described to you, and of which description you have just been speaking? I do not know where the bounds of the Wilson land did lie, and I can not tell where the boundaries of Wilson's land were shown to me, I can not answer it. Question. Did you consider the south bounds of the lands mentioned in the certificate as being south of the north bounds of the Wilson lot described to you and which description you have given to us on your cross-examination? Answer. I

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considered, and I meant from the description given to me to convey all the land to Phineas Wilson's north line. I supposed at the time there were two acres. I meant the description I have given here in my broken way, as near as I could, being so frustrated." The counsel for the defendant then offered to read in evidence, a deed of conveyance from the sheriff of Cayuga county, to George Passage, dated September 6th, 1848, of the premises described in the certificate of sale; to the introduction of which evidence, the counsel for the plaintiff objected, on the following grounds, to wit: 1st. That the deed appeared not to be given for or to include the premises in question. 2d. That it appeared in evidence that the sale of the premises described in the certificate and deed, were not duly advertised, and that Bennett, the plaintiff in the execution, was not a purchaser in good faith, without notice, and that the deed was void for uncertainty in description. Which objection was overruled by the referee, and the counsel for the plaintiff excepted to the decision. Said deed was then read in evidence by the counsel for the defendant. The counsel for the defendant then read in evidence a certified copy of the transcript of said judgment, indorsed as filed in the clerk's office of the county of Cayuga, August, 1842; also a transcript of said judgment, which was docketed in Cayuga county clerk's office, August 5th, 1842, 9 A. M. Testimony was then introduced, for the purpose of showing fraud in the deed from Christopher Edee to Conrod Edee, dated September 10, 1839; which it is unnecessary to notice. Phineas F. Wilson was next examined as a witness on the part of the defendant, and testified as follows: "I am the person who deeded the land on the north of the road leading from Weedsport to Jordan, to Christopher Edee—it did not touch the road all the way, there was a little gore on the southeast corner, belonging to the Passage farm. I never owned land on the south of that—I never owned land in that neighborhood since 1837. I have never owned any land south of the three-cornered piece. The land I sold to Edee was bounded on the east by Field's, on the north by the Margaret Edee lot, west by the Cato road, and south by the road running from Weedsport to Jordan, and the gore of the Passage land.

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There was a little over three acres in my lot, including the acre in the southwest corner, and I should think between one and two acres in the Margaret Edee lot." The counsel for the plaintiff here produced and read in evidence a deed of conveyance executed by George Passage and wife to Margaret Edee, dated October 26th, 1836. The premises conveyed by said deed were described in the deed as follows, to wit: "Being a three-cornered piece of land lying on the east side of the highway leading from Anna Passage's to the Erie canal, and bounded on the west by the centre of said highway above described, on the east by lands owned or occupied by Joshua Bishop, and on the south by lands now owned by P. F. Wilson, supposed to contain about two acres of land, more or less," which said deed was recorded in the clerk's office of Cayuga county, December 3d, 1838. Said Wilson further testified as follows: "The premises described in the deed from George Passage to Margaret Edee, are what is called the Margaret Edee lot." The counsel for the plaintiff then read to witness from the sheriff's certificate, the description of the premises first described therein, also the description in the complaint, and then inquired of the witness whether the two descriptions embraced the same premises, to which the witness answered, "I should think that the description in the complaint, including the acre in the south-west corner, is the same land that I sold Christopher Edee." The plaintiff's counsel then read to the witness, the description from the sheriff's certificate of sale, and then asked the witness, "Could this description include any land you sold to Christopher Edee?" Answer. "It could not, according to the reading of it, because I owned no land there at the time. If I had owned any land there at the time, it would not include my land."

The counsel for the defendant again called as a witness John S. Everts, and put the following question to him: "At the time you made the levy where did you understand P. F. Wilson's land to lie?" which question, and the testimony called for by it, was objected to by the counsel for the plaintiff, on the ground, among other things, that it was irrelevant, and that the understanding of the witness as to the location of the Wilson lot, could

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have no bearing upon the case. The referee overruled the objection. The counsel for the plaintiff excepted, and the witness answered, "I understood it to be on the south side of the road, when I made the levy and advertised. What brings it more fresh to mind is, that since my examination here before, I recollect a conversation with David Passage who was cradling wheat on the south side of the road, and which I supposed was on Wilson's land. If I have said that Wilson's land was on the north side of the road, when examined before, I meant south side instead of north side. I was told at the time that Christopher Edee had sold one acre in the southwest corner." "At the time I made the sale I read the notice and put up for sale the premises therein described. If I said on my previous examination that the Wilson lot might have extended so far as to include the one acre, I did not mean so. I do not know that it ran so far west as the acre. I did not get the Wilson boundary at all, I find. I probably was mistaken about it. Seeing Passage cradling wheat, it got into my mind that was the land that belonged to Wilson. Since the adjournment I have talked with Passage and refreshed my mind more in relation to it. Did not hear P. F. Wilson testify. I now know where the Margaret Edee lot is, but did not know before today, to my knowledge."

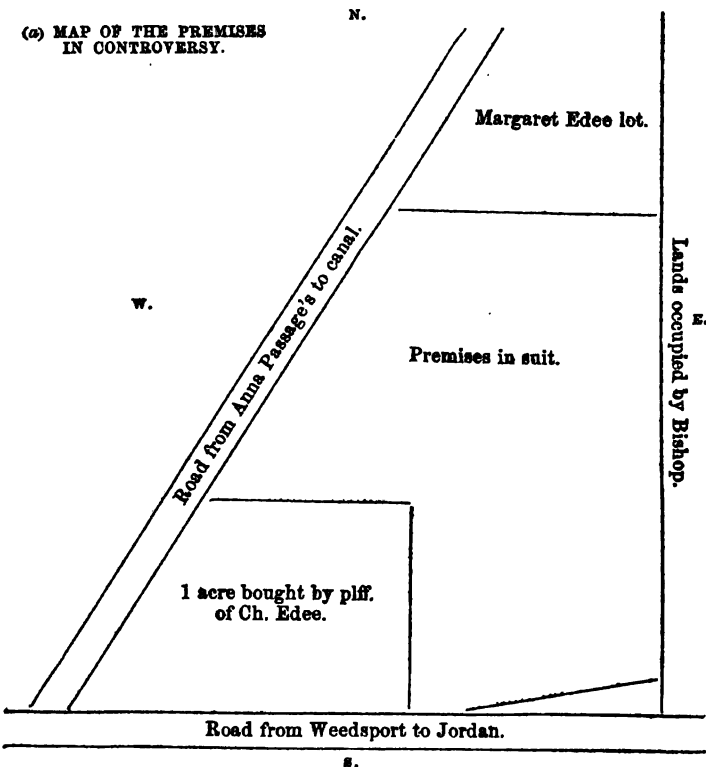
The counsel for the plaintiff then proposed to the witness the following question. "Question. Suppose the Wilson lot spoken of to be bounded on the north by the Margaret Edee lot, then would the boundaries of the premises mentioned in the sheriff's certificate include the premises mentioned in the complaint? Answer. No."

John J. B. Rude was then recalled and examined as a witness by the counsel for the plaintiff, and testified (upon the description of the piece of land first mentioned in the certificate being read to him,) "The boundaries of the premises read from the certificate, do not include the premises occupied by White, as mentioned in the complaint, they agree with the boundaries of the Margaret Edee lot, and I take them to be the same, having lived about thirty years within about one hundred rods of the Margaret Edee lot, and having been acquainted with it for that

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time, and frequently been on it, should think there was about two acres of it. It is level and deceptive to the view. I formed my opinion as to the boundaries upon the fact that the premises mentioned in the certificate are bounded south by the Wilson lot. If the Wilson lot lay south of the road, the description in the certificate would include the premises in question."

Joseph Manning was next examined as a witness on the part of the plaintiff, and testified as follows: "I am acquainted with the premises known as the Margaret Edee lot—for twenty years have I lived within one half mile of them and known them during that time, worked on them when Samuel Wilson owned the lot next south, I mowed the lot—have since then frequently been on it. There is in the neighborhood of two acres of it. About twenty years ago I built a fence on the south side of it."(a)



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The evidence here closed, and the referee decided that the evidence on the part of the defendant entitled him to a judgment, and reported in his favor. And from the judgment entered upon the report, the plaintiff appealed.

Wm. Porter, Jun. for the appellant.

Wm. J. Cornwell, for the respondent.

By the Court, ALLEN, J. Upon the evidence in this cause I should come to a conclusion different from that to which the referee has arrived, as to what land the sheriff intended to sell. The recollection of the sheriff is evidently very far from being distinct, or even satisfactory to himself; and he does not appear to have been very familiar with the premises, and the farms adjacent. Without in the least impeaching the integrity or candor of the sheriff, it may well be said that his testimony is not reliable, as to what premises he had in his mind at the time of the levy and sale upon the execution against Christopher Edee. It would be remarkable if, at this distance of time, and with a multiplicity of other transactions pressing upon his mind during the entire interim, he should be able to recollect any thing of the details of this transaction. His intent, however, is not material to the decision of this cause, except as such intent is evidenced by his acts, and is expressed in the deed which he executed pursuant to his levy and sale. In this case the inquiry into the intent of the officer making the sale and executing the conveyance under which the defendant claims title, must be restricted to the terms used, and to the intent which the language of the instrument expresses. There are several reasons why this should be so, in a case like the present.

I. The statute regulating sales upon execution requires, 1st, that the notice of sale should contain a description of the real estate, with common certainty, by setting forth the name of the township or tract, and the number of the lot, if there be any, and if there be none, by some other appropriate description; that is, a description by which it may be known and distin-

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guished from every other parcel of land. (2 R. S. 369, § 35.) And 2d, that the certificate of the sale, to be made and filed by the sheriff, shall contain a particular description of the premises sold. (*Id.* 370, § 42.) The deed of course follows the notice and certificate.

II. Public policy requires that the notice of sale should contain a description of the premises, by which they may be known and located, that all persons may bid and become the purchasers upon equal terms; and that it may not be left to the sheriff, as he may like or dislike the purchaser, or for any other reason, to make the sale operative upon such of several parcels of land as he may see fit, by a subsequent declaration of his secret and undisclosed intent; or to enlarge or diminish the boundaries of the premises actually sold, by a like declaration.

III. The judgment debtor should be able to know with certainty, from the notice and certificate of sale, what premises were actually sold, that he may understandingly determine whether he will redeem them, or whether in fact any premises to which he has a claim have been sold.

IV. Judgment creditors and mortgagees should be able to determine from the certificate what premises have been sold, that they may protect their interests by acquiring the title of the purchaser, under the statute, if they should see fit to do so. These reasons, amongst others, should, in my judgment, preclude a resort to extrinsic evidence to establish the intent of the officer making the sale. It is not like the case of a deed *inter partes*, and the rules applicable to such case need not be examined. Deeds of bargain and sale between man and man may doubtless, to some extent, be explained by showing the intent of the parties; and in some cases if the deed, by reason of fraud or mistake, fails to express the true intent, it may be reformed and made to express such intent. It is very clear however, that a deed of a sheriff can not thus be reformed, and that if it follows the notice and certificate of sale, it can not be in any respect varied, for any reason, or made operative, except according to its terms. There is no doubt that in this case extrinsic circumstances may be resorted to to explain the

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terms used, and locate the premises described in the deed. This would, however, be only to establish and carry out the intent expressed in the deed, and not an intent which the terms of the deed fail to express. If an individual own two tracts, having the same name, and conveys one, by its name, extrinsic evidence might be resorted to, to show which was intended; but in a like sale by a public officer, upon an execution against the owner, if the officer either through ignorance that there were two tracts of the same name, or for any other reason, should omit to designate which tract was sold, I can not think that the sale would be valid. It would be void for uncertainty.

The question before us is one of construction, and is matter of law. (*Frier v. Jackson*, 8 *John*. 495.) It is not a question of boundary, which would be for the jury and in this case for the referee to determine, and perhaps not the subject of review upon this appeal. (*Barclay v. Howell's Lessee*, 6 *Pet*. 498.) It is conceded that the entire description of the premises in the deed of the sheriff, will not apply to the premises in dispute. But it is sought to bring the case within the principle of the maxim, *falsa demonstratio non nocet*, and to include the premises in dispute by a rejection of the last clause of the description in the deed under which the defendant claims. The rule upon the subject appears to be that if there are certain particulars once sufficiently ascertained, which designate the thing intended to be granted, the addition of a circumstance, false or mistaken, will not frustrate the grant; (*Jackson v. Clark*, 7 *John*. 228;) that if there is a certain description of the person, or thing devised, and a further description is added, it is immaterial whether the superadded description be true or false. (*Jackson v. Sill*, 11 *John*. 212. *Jackson v. Loomis*, 18 *Id*. 84; *S. C.* 19 *Id*. 450. *Doe v. Roe*, 1 *Wend*. 541.) The description of the premises sold by the sheriff, as contained in his deed, is as follows: "All that certain piece or tract of land situate, lying and being in the town of Brutus and county of Cayuga, on lot number fifty-five, bounded on the west by the highway as leading from Anna Passage's to the Erie canal, east by land occupied by Joshua Bishop, and south by land owned

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by P. F. Wilson, containing about two acres of land, be the same more or less." The premises in dispute were once owned by P. F. Wilson, but are not bounded on the south by any lands that are or ever have been owned by him. The southern boundary, then, the defendant claims, should be rejected as false or mistaken. But one parcel of land can be, upon any construction, included within this description, and yet there are two parcels to which it will apply if, as is claimed by the defendant, it can be applied to the premises in dispute; for directly north of and adjoining the premises in dispute is another parcel of land answering the description in the sheriff's deed, in every respect, and in which the judgment debtor had at the time an interest in right of his wife, liable to be sold on execution. The premises in question the debtor had before then conveyed by deed which the referee now adjudges to be fraudulent. Now, which of these two parcels of land can be said to be sufficiently ascertained or to be certainly described, or described with certainty to a common intent, by this description equally applicable to both? Shall we leave it to the sheriff to declare which he intended, or shall we leave it to the purchaser to elect which he will take? In a case like the present, if two distinct parcels of land are found equally answering the description, the conveyance must be held inoperative, for the reason that it was intended to pass but one, and it can not be determined which was intended. (*Richardson v. Watson*, 4 *Barn. & Ad.* 787. *Den v. Leggett*, 3 *Murph.* 373. 1 *Phil. Ev.* 532. *Osborn v. Wise*, 7 *C. & P.* 761.) Were this a question upon the construction of a devise, or of a deed *inter partes*, it is possible that evidence of intent might be received to control the application of the description of the subject matter of the devise or grant, (*Pritchard v. Hicks*, 1 *Paige*, 270;) or both parcels might be held to pass, rather than the conveyance be defeated. (*Worthington v. Hylllyer*, 4 *Muss. Rep.* 206.) In such cases grants are construed most strongly against the grantor. But such can not be the principles applicable to a sale by a public officer, under judicial process, in which persons other than the officer and the purchaser are interested. (*See per*

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Chancellor, 13 John. 552.) Neither is this a case of a double description, as are many if not most of the cases in which the maxim referred to has been applied. All the particulars stated in the sheriff's deed are necessary to identify the thing described, and in such cases evidence of intent to embrace a matter not answering every part of the description is not admissible, even in actions involving the construction of devises, or deeds *inter partes*. (6 *Cowen*, 720, *note*.) But if we go further and find that the description, when reformed as the defendant would have it reformed, is still a very loose and imperfect description of the premises in dispute, and would even then as well, if not better, describe the other parcel of land which the judgment debtor held in right of his wife, and further, that the description contained in the deed, without alteration, is an accurate description of the latter parcel, by which it would be readily recognized by one familiar with both parcels and the adjacent lands, no court or jury would be authorized to disregard and reject the true description, or apply it to a parcel of land not embraced within it. In other words, if a parcel of land exists, in which the debtor had an interest liable to levy and sale on execution, and which in every respect and particular answers the description of the premises sold, no part which is necessary to a perfect description will be rejected as surplusage, so as to embrace a distinct or different parcel of land, to the exclusion of the one accurately described.

I. If, as is claimed by the defendant, it is conceded that the sheriff intended by the south boundary of the lands sold, the land on the south side of the road from Weedsport to Jordan, which, in fact, never belonged to Wilson, although it would be difficult to suppose that in that event the sheriff would not have bounded south on the road, which was a prominent and well defined boundary, still the description will be imperfect. (1.) There is no northern boundary, and no data from which a northern boundary can be given. (2.) The quantity of land in the premises in question exceeds the quantity mentioned in the deed, after excepting an acre in the southwest corner, which would be

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included in the description, but which it is not claimed, was sold at the sheriff's sale, the same belonging to a stranger.

II. If the south boundary, as given in the sheriff's deed, is stricken out, then we have but the east and west lines, equally applicable to the two pieces which it is claimed were subject to be sold upon the execution, with no means of telling which was intended, and fixing the northern and southern boundaries, either by reference to actual occupation or in any other way.

III. With the southern boundary wanting, the residue of the description would better describe the north parcel of land than the premises in dispute. The north parcel which the judgment debtor occupied, and which he held in right of his wife, was situated in the angle formed by the intersection of the Anna Passage road with the line of Bishop's land, so that no north bounds were necessary, the parcel being triangular, and the quantity of land in this parcel is about the same as stated in the deed.

IV. But the description contained in the sheriff's deed is precisely that of the land conveyed to the wife of the judgment debtor. 1. As before said, it has no northern boundary: it is bounded on the west by the road mentioned, on the east by Bishop's land, and on the south by lands then lately owned by P. F. Wilson. It is true that the deed speaks in the present tense, when speaking of land owned by P. F. Wilson, but as there is no other land in the vicinity, to which it can apply, the land *recently* owned by Wilson would be intended, (*Cowen & Hill's Notes*, 1377, and cases cited,) and the deed should receive this construction *ut res magis valeat quam pereat*. 2. The deed to Mrs. Edee, of the triangular lot, was on record, and the conveyance to her was by the same description by which the sheriff sold, with the single exception that the sheriff, in his description, bounds the south "by lands owned by P. F. Wilson," and Mrs. Edee's deed bounds south "by lands *now* owned by P. F. Wilson," the word "now" being omitted in the sheriff's deed—a mere verbal and that an immaterial departure from the recorded and well known description of Mrs. Edee's land. The purchaser could, without difficulty, and without parol proof or

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reference to extrinsic circumstances, trace his title to the triangular piece by the description given in the sheriff's deed. 3. As evidence that in fact this piece, and not the premises in dispute were sold, it may be remarked that Mrs. Edee's deed was on record, the judgment debtor's occupation was public and the right to sell that was undisputed, while neither the deed from Wilson to the debtor, nor the one from the debtor to his brother, were on record; and there is no reason to suppose that the sheriff or the purchaser, who was the judgment creditor, had any idea that the debtor had any title to, or interest in, the Wilson premises by which they bounded the land actually sold, on the north. I think that it is very evident that the purchaser either acquired a title to the triangular tract, to the extent of the estate of the judgment debtor, or that he acquired no title to any land, by reason of the uncertainty in the description. The amount bid may be referred to as some little evidence—very slight it is true—of the estate which the purchaser supposed he was getting in the lands sold. In *Jackson v. DeLancy*, (13 John. 538,) it was held by the court for the correction of errors, that in a sheriff's deed the land sold must be described with reasonable certainty, and that the sheriff can sell nothing which the creditor can not enable him so to describe. The remarks of the chancellor, at pages 551 and 552, are applicable to this case, upon the theory that the triangular piece of land is not clearly described in the sheriff's deed, and that it is left uncertain which parcel of land was intended, and clearly show that the premises in question did not pass to the purchaser at the sheriff's sale. In *Jackson v. Striker*, (1 John. Cas. 284,) it was held that nothing will pass at a sheriff's sale but what is then known and promulgated. *Dike v. Lewis*, (4 Den. 237, S. C. 2 Barb. S. C. Rep. 344,) decides that a comptroller's deed of lands sold for taxes, which designates the lot by a wrong number, is void, though it contains other matter of description which, if the number were rejected, would sufficiently identify the lot. If this had been a deed of bargain and sale between individuals, the number of the lot might and would have been rejected, and the deed would not have been held void. The

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same principle is decided in *Tallman v. White*, (2 Comst. 66,) and the same distinction between deeds between individuals and deeds executed by public officers recognized, it being allowed in the former, to reject a part of the description of premises on account of its falsity, while such practice is not allowable in deeds of the latter class. We are of the opinion, therefore,

1. That the deed under which the defendant claims title does not embrace the premises in question, but does include the triangular piece owned by Mrs. Edee.
2. That if the Margaret Edee tract is not included in the deed, then the deed is void for uncertainty, and no title passed to the purchaser.
3. That in the construction of the sheriff's deed every part of the description must be read and satisfied with reasonable certainty, and that no part of it can be rejected for its falsity.

The judgment must be reversed, and a new trial had before the referee : costs to abide the event.

[ONEIDA GENERAL TERM, January 6, 1851. *Gridley, Allen and Hubbard, Justices.*]

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65h	130
11	191
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 KING and others vs. DUNTZ and others.

Under the revised statutes, as amended in 1844, there are three necessary prerequisites to a valid sale under a power contained in a mortgage. The notice of sale must be published for a specified time in a specified newspaper; a copy of such notice must be affixed in a specified place, a certain period before the time of sale; and a copy must be served upon the mortgagor or his personal representatives, &c. at least fourteen days before the time of sale.

Where a mortgage is executed by husband and wife, and the wife survives her husband, she is entitled to notice of sale. And if notice is not served upon her, she is not barred by the sale; and the heirs at law of the husband may take the objection.

In case of the death of the mortgagor, notice of sale need not be served upon the heirs.

It is a general rule that a party coming into court to redeem is charged with the costs, though he succeeds in the action. But where the plaintiffs, before

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bringing their action, tendered the amount due upon the mortgage and any costs which had been incurred; *held* that neither party was entitled to costs, as against the other.

THIS action was brought by the plaintiffs, who are the widow and heirs at law of Andreas King deceased, for the redemption of mortgaged premises. On the 20th of September, 1841, Andreas King, together with his wife, executed a mortgage for \$100 to one Silvernail, upon a piece of land which he then owned in Taghkanic, in the county of Columbia. He subsequently died, and, after his death the mortgage was assigned to the defendant Christina R. Duntz. After she became the owner of the mortgage, the premises were sold under a statute foreclosure, and she became the purchaser. No copy of the notice of sale was served on the widow, nor upon any of the heirs at law of Andreas King. These facts were admitted upon the trial. The cause was tried at the Columbia circuit in January, 1851, without a jury.

S. L. Magoon, for the plaintiffs.

K. Miller, for the defendants.

HARRIS, J. Under the revised statutes, as amended in 1844, there are three necessary prerequisites to a valid sale under a power contained in a mortgage. The notice of sale, the contents of which are prescribed, must be published for a specified time in a specified newspaper. A copy of that notice must be affixed in a specified place, a certain period before the time of sale. And then, a copy of the same notice must be served upon *the mortgagor or his personal representatives*, and upon certain other persons, also specified, at least fourteen days before the time of sale. The statute declares that "every sale pursuant to a power as aforesaid and *conducted as herein prescribed*, made to a purchaser in good faith, shall be equivalent to a foreclosure and sale under the decree of a court of equity." Has the sale, by virtue of which the defendants claim to have acquired title to

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the mortgaged premises, been *conducted in the manner prescribed by the statute*? The notice was properly published and a copy thereof affixed on the outward door of the court house, but a compliance with the third requisite seems to have been omitted. Andreas King, who executed the mortgage, was dead. Whether or not he had personal representatives does not appear. But whether he had or not, his widow was living, and she, having executed the mortgage, was a *mortgagor*, and entitled to notice. I am inclined to think the omission to serve a copy of the notice upon her was fatal to the validity of the sale. It may be, however, that the sale would be held to bar the equity of redemption of such parties as were, *in fact*, served with notice. Be this as it may, the surviving mortgagor, who has a right of dower in the premises, and who was not served with notice of the sale, is not barred.

I am inclined to think also that the heirs are entitled to redeem. It was contended on the argument that in order to bar their equity of redemption they should have been served with notice. I do not so construe the statute. The legislature did not intend to impose upon the party foreclosing a mortgage the necessity and hazard of ascertaining to whom, in case of the death of a mortgagor, the property to be sold had descended. The personal representatives, therefore, were substituted for the heirs. As it does not appear that there were any such representatives in this case, no objection can be predicated upon the want of such a notice. But there was a surviving mortgagor, and I think the heirs at law of the deceased mortgagor are entitled to take the objection that the requisite notice was not served on the survivor, as they undoubtedly might have objected, in case it had appeared that there was a personal representative who had not been served with notice.

I think the plaintiffs are entitled to the usual judgment for the redemption of the mortgage. (*See 2 Barb. Ch. Pr.* 199.) It is a general rule that a party coming into court for redemption is charged with the costs, though he succeeds in the action. But in this case the plaintiffs, before bringing their action, tendered the amount due upon the mortgage and any costs which

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had been incurred by the defendants. Under these circumstances, I think it equitable to give neither party costs as against the other.

[COLUMBIA SPECIAL TERM, January 6, 1851. Harris, Justice.]

JOHNSON vs. WHITE and others.

Where A. purchased of B. one of several parcels of land which were subject to a mortgage, and subsequently B. became insolvent, and made an assignment of his property, including a part of the land mortgaged, to trustees, in trust for the payment of his debts, the lands assigned being first chargeable with the payment of the mortgage, and being a slender security for the debt, interest and costs, and A.'s parcel being chargeable in case the land assigned should prove insufficient; *Held* that A. was, in legal effect, surety for the land assigned that when sold, upon the foreclosure of the mortgage, it should satisfy the mortgage; and that he had a right to see that the principal fund was not impaired by any waste committed thereon, by the assignees.

Held also, that A. was entitled to an injunction to prevent the commission of waste by cutting timber, &c. upon the land; but not to prevent the removal of timber already cut.

IN EQUITY. This was a motion to dissolve an injunction. On the 28th day of March, 1844, John Tift 2d purchased of William P. Van Rensselaer several parcels of land in Stephentown, in the county of Rensselaer. He received a conveyance of the land and executed a mortgage for nine hundred and fifty dollars, to secure a part of the purchase money. Upon this mortgage there was due, at the time this action was commenced, \$650 besides interest. On the 30th of Sept. 1848, Tift sold to the plaintiff one of the parcels of land so purchased by him, and received the consideration therefor. Subsequently, Tift became insolvent, and on the 11th day of Sept. 1850, he made an assignment of his property, including a part of the land mortgaged to Van Rensselaer, to the defendants, in trust for the payment of his debts. It was alleged in the complaint, and admitted by the defendants, that the assigned lands were first

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chargeable with the payment of the mortgage, and that those lands were a slender security for the debt, interest and costs. This suit was commenced on the 9th of December, 1850. On the 14th of the same month, the premises were sold upon a foreclosure of the mortgage. After applying the proceeds towards the satisfaction of the mortgage, there remained due a balance of more than \$200, for which the land purchased by the plaintiff of Tift was liable.

The principal value of the lot in question consisted in the saw mill and machinery standing thereon, and the timber thereon. The complaint stated that the defendants had already felled a large quantity of trees which were standing upon the lot at the time of the assignment, a part of which they had converted into saw logs, and were sawing into lumber at the mill upon the premises, and the remainder they had been, and were then engaged in burning into coal, and that they threatened to strip the saw mill of its machinery and fixtures, and the land of the trees, timber and wood thereon, and to convert and dispose of the same to their own use, leaving the mortgage unsatisfied.

In pursuance of the prayer of the complaint, an injunction was issued, restraining the defendants from committing or permitting any waste, spoil or destruction, of or upon that part of the mortgaged premises assigned to them, *and from intermeddling with or disposing of the machinery and fixtures in and belonging to the saw mill thereon, or severed therefrom by them, and from removing, intermeddling with, or disposing of the trees, wood, and timber severed therefrom by them, or the boards, timber or coal manufactured therefrom by them*, until the further order of the court.

The defendants in their answer admitted that they had felled some trees, but they denied that in doing so they had used the premises in an improper or unusual manner, or in a manner different from what other lands in the same vicinity were used, or that they had cut half as much timber as Tift was in the habit of cutting in the same length of time. A great number of affidavits were read by each party, the contents of which it is not necessary to notice particularly. They related chiefly to the

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amount of timber cut upon the premises by the defendants, and some declarations of the defendants tending to show that they intended to make as much as they could out of the wood and timber upon the premises before they should be sold upon the foreclosure of the mortgage.

J. Romeyn, for the plaintiff.

M. J. Townsend, for the defendants.

HARRIS, J. I have no doubt of the right of the plaintiff to maintain this action. He had, at the time he brought the suit, such an equitable interest in the premises claimed by the defendants under their assignment as justified him in applying for an injunction to restrain the defendants from committing acts which might result in irreparable injury to him. The defendants were the assignees of an equity of redemption in the land. This land was primarily chargeable with the payment of the mortgage for the purchase money. The plaintiff's land was chargeable in case the land assigned should prove insufficient. The plaintiff, in legal effect, was surety for the defendants' land that, when sold upon the foreclosure, it should satisfy the mortgage. Under these circumstances, he had a right to see that the principal fund was not impaired by any waste committed thereon by the defendants. (*See 2 Stor. Eq. §§ 914, 915, and cases there cited.*) "The jurisdiction of courts of equity, to interpose by way of injunction, in cases of waste," says Story, "may be referred to the broadest principles of social justice. It is exerted where equitable rights and equitable injuries call for redress, to prevent a malicious, wanton and capricious abuse of their legal rights and authorities by persons, having but temporary and limited interests in the subject matter." (*Id.* § 919.)

So far, therefore, as this injunction stayed the future commission of waste, it was properly granted. But it went farther, and restrained the defendants from disposing of the wood and timber already severed from the land and converted into personal property. The right of the plaintiff to this branch of the injunction

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is, certainly, not so clear. The defendants held the legal estate in the premises. They were rightfully in possession. They had the legal right to fell the trees and convert them into lumber or coal as they saw fit. It became inequitable for them to exercise that right, only because it impaired the sufficiency of the plaintiff's indemnity against the liability of his own land for the payment of the mortgage. The defendants may be, and probably are, liable for the waste already committed. But if so, it does not follow that the plaintiff is entitled to the logs and lumber and coal manufactured from the trees cut from the premises by the defendants. Nor would the plaintiff be entitled, as a matter of course, to the value of these materials. The inquiry would be, to what extent has the plaintiff been injured by the acts of the defendants? in other words, how much has the realty, chargeable with the payment of the mortgage, been depreciated in value by the waste committed by the defendants? An account is to be taken of the damages sustained by the plaintiff, and those damages, and not the property itself, will be recovered. The object of allowing an injunction to stay waste, as in every other case, is to prevent irreparable injury. But what injury will the plaintiff sustain by permitting the defendants to dispose of the property they have severed from the premises? I can conceive of none, unless it be, that it will not be on hand to satisfy any judgment which the plaintiff may happen to recover. It will not be pretended that this is a sufficient reason for restraining the defendants from disposing of the property. Certainly not, when it is not pretended that they are unable to respond to any recovery which may be had against them. I will not say that had it been made to appear that the defendants were insolvent, the circumstances of this case are not such as would justify the court in holding the property manufactured from the trees severed from the mortgaged premises liable for the satisfaction of the mortgage. This seems to have been the opinion of Mr. Justice Paige in *Spear v. Cutler*, (6 Barb. 486.) In that case, an injunction had been granted not only restraining the commission of future waste, but also preventing the removal of timber already cut. It appeared that the plaintiff was the owner of

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the land, and that the defendant was insolvent. Under these circumstances it was held that the injury would be irreparable if the defendant should be allowed to remove or dispose of the timber he had cut upon the plaintiff's land.

The question was very fully examined by Chancellor Kent in *Watson v. Hunter*, (5 *John. Ch.* 169.) There, an injunction was asked for, to restrain the defendants from cutting timber, *and also from removing that already cut*. In respect to the last branch of the injunction, the chancellor said, "There must be a very special case made out, to authorize me to go so far; and such cases may be supposed. A lease, for instance, may have been fraudulently procured by an insolvent person, for the very purpose of plundering the timber under shelter of it. Perhaps in that and like cases, where the mischief would be irreparable, it might be necessary to interfere in this extraordinary way and prevent the removal of the timber." In that case, the injunction was restricted to the timber standing or growing at the time it was served. So far this injunction was proper. But as the premises were sold under the mortgage a few days after it was issued, and the plaintiff, who became the purchaser, is now in possession, there can be no necessity for continuing even that part of the injunction. The motion is therefore granted, but, under the circumstances, I do not think the plaintiff should be charged with costs.

[RENSSELAER SPECIAL TERM, January 20, 1851. *Harris*, Justice.]

WHITNEY and others vs. KROWS and others.

An assignment of his estate, by an insolvent debtor, for the benefit of creditors, which confers upon the assignees an express authority to sell on credit, is void.

The decision of the court of appeals, to that effect, in *Griffin v. Barney*, (2 *Comst.* 365,) approved.

But a provision authorizing the assignees "to sell and dispose of the property

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upon such terms and conditions as in their judgment may appear best," &c. and "to convert the same into money," will not be construed as authorizing them to sell on credit.

The fair construction of such a provision is that the trustees are to exercise their judgment as to the manner of sale, but when they sell they are to receive the money.

Nor will it render an assignment void to insert in it a provision authorizing the assignees to effect an insurance upon a portion of the assigned property, and to keep good an insurance already existing, upon another portion of the property, so long as in their judgment it shall be necessary.

Neither will an assignment be vitiated by a provision authorizing the assignees, if they shall deem it necessary, to pay the interest on a mortgage which is a prior lien upon the assigned property, and the principal and interest on another mortgage, if they shall deem it for the interest of the creditors to do so.

THIS action was brought to set aside an assignment executed by the defendant, William Krows, to the defendants Frederick Krows, Peter P. Post and Charles N. Hommel. The assignment was executed on the 24th of October, 1848, and conveyed all the property of the assignor, both real and personal, not exempt from execution, in trust for the payment of debts. By the terms of the assignment, the assignees are authorized "to sell and dispose of the property, *upon such terms and conditions as in their judgment may appear best, and most for the interest of the parties concerned, and convert the same into money.*" The assignees were also required to use so much of the trust moneys as might be necessary to effect an insurance of \$1000 upon the Exchange Hotel, a part of the assigned property, and to keep good the insurances upon the property, existing at the time of the assignment, and also to keep and effect an insurance on the store of goods and merchandise assigned, so long as in their judgment the same should be necessary. The real estate assigned was incumbered by two mortgages, one for \$3000, the other for \$1500. The assignees were authorized, if they should deem it necessary, to pay the interest on the first mortgage, and the principal, as well as the interest, on the second mortgage. They were not to pay this mortgage unless they should deem it for the interest of the creditors to do so.

On the 25th of April, 1849, the plaintiffs recovered a judg-

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ment against William Krows, for \$1602,15, upon a debt existing prior to the execution of the assignment, upon which judgment an execution was issued, and was still in the hands of the sheriff. On the 16th of April, 1849, the defendants, James Russell and Solomon S. Hommel, purchased of the assignees the real estate included in the assignment, and received a deed therefor. This deed the plaintiff sought to set aside, on the ground that the assignment, being void upon its face, no valid title could be made by the assignees.

E. Cooke, for the plaintiffs.

M. Schoonmaker, for the defendants.

HARRIS J. Whether or not an assignment for the benefit of creditors, which authorizes the assignees to sell the assigned property upon credit, is void, does not seem to be finally settled. It was clearly the opinion of the judge who pronounced the judgment of the court of appeals in *Griffin v. Barney*, (2 Comst. 865,) that such an assignment could not be upheld. But as there was another objection to the assignment in that case, which the same learned judge deemed equally fatal to its validity, another court of acknowledged respectability has since felt itself at liberty to regard that case as a mere expression of the opinion of a single judge upon this point, and not as an adjudication of the question. (*Nicholson v. Leavitt*, 9 N. Y. Legal Observer, 105.) The opinion of Judge Bronson, in *Griffin v. Barney*, was the only opinion delivered in the case. It certainly purports to have received the approval of each member of the court. The very learned judge who delivered the judgment in *Nicholson v. Leavitt*, concedes that the opinion admits of no other construction than that an assignment which confers upon the assignees an express authority to sell on credit is void. It seems to me, with great respect for the learned tribunal that has thus dissented from the opinion admitted to have been unequivocally expressed in *Griffin v. Barney*, that this and other inferior courts ought to hold themselves bound by an opinion, upon the very question

under adjudication, and apparently adopted by the whole court, until the same court shall see fit to explain or dissent from that opinion.

But assuming that an assignment which authorizes a sale upon credit is void, as I think it is, as well upon principle as authority, I do not find any thing in the assignment in question which amounts to such a power. The assignees are "to sell and dispose of the property upon such terms and conditions as in their judgment may appear best," &c. In giving a construction to this language, it should not be presumed that the parties intended that the power should be exercised in a fraudulent or unlawful manner. It is to be understood that it was intended to confer upon the assignees authority to sell and dispose of the property only upon *legal* terms and conditions. If it is *unlawful* to sell upon credit, it is not to be inferred that such authority was intended, any more than that it was intended to authorize the assignees to sell the property at one-third of its value. Thus, in *Meacham v. Stearns*, (9 *Paige*, 398,) the assignment provided that the property should be sold by the trustee *in such manner and at such reasonable times* as should seem proper to him. The assignee sold upon credit. But the chancellor said, "the very nature of the trust precluded the idea that he should have the right to sell the property at retail, upon credit." In this case, when the whole clause containing the authority to sell is taken together, there is still less ground to infer an intention that the sale should be upon credit. While the assignees are authorized to sell upon such terms and conditions as to them should seem best, they are also to convert the property *into money*. The fair construction of the whole provision is, that the trustees are to exercise their judgment as to the manner of sale, but when they sell they are to receive the money. They are to convert the property into *money*, and not *debts*.

Nor do I think the assignment objectionable upon the other grounds taken by the plaintiff's counsel. It certainly can not render an assignment void to insert in it a provision authorizing, by express terms, that to be done, which might lawfully have been done without such express authority. If it were lawful,

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for example, for assignees to sell upon credit, it would not render the assignment invalid to express in it authority so to sell. So, if it be lawful to insure property until it can be sold, or to discharge prior liens or charges upon the property, it can not be unlawful to declare the authority of the trustees so to do, in the assignment itself. Suppose the assigned property had been growing crops, it clearly would have been the duty of the assignees to employ laborers to harvest and secure them. It would not be pretended that an express authority to that effect would vitiate the assignment. So, in this case, where the property assigned was liable to be destroyed by fire, the assignees would have been justified in having it properly insured until it shall be disposed of by them. I do not understand the express authority in the assignment to go beyond this. The assignees are to continue the insurance so long as in their judgment it shall be necessary, and no longer. It is referred to their discretion. In short, no greater power is conferred upon them by this provision than they would have possessed without it. So also, in respect to the incumbrances upon the property. Had there been nothing said on the subject in the assignment, the assignees would, undoubtedly, have had the right to relieve the property from the prior liens, if in the fair exercise of their discretion, they had deemed it for the interest of creditors that they should do so. The assignment authorizes no more.

Having come to the conclusion that the assignment itself is valid, it becomes unnecessary to consider the other questions discussed upon the argument. The complaint must be dismissed with costs.

[ULSTER SPECIAL TERM, April 28, 1851. *Harris*, Justice.]

WEED vs. FOSTER & STIMSON.

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A publication alledging that the plaintiff, being an influential politician in the city of A., had been paid \$5,000 in cash, for procuring the appointment of an inspector of pork in the city of N. Y., by the governor, and that large sums had also been paid to the plaintiff for other lucrative offices, *held libelous per se.*

DEMURRER to complaint. The action was for a libel. The complaint stated that the defendants, being the editors and publishers of a newspaper called the Day Book, published of and concerning the plaintiff a libel in the following words: "Corruption in Albany. The following extract is from a letter written from New-York to the Syracuse Star. The game attempted to be played by Bull has been successfully played for many years in Albany, by persons much higher in office than himself. The sum of \$5,000 was paid to an influential politician of that city in 1840, for the office of inspector of pork in New-York, under the appointment of Governor Seward; large sums have also been paid to the same individual for other lucrative offices here and elsewhere. It is also susceptible of proof that officers and members of the legislature have received large bribes for opposing or advocating divers measures. The transaction alluded to was the appointment of an inspector of pork by Governor Seward, for which appointment Thurlow Weed received \$5,000 in cash. A fair business transaction!"

The defendants demurred to the complaint, alledging for cause of demurrer that it did not state facts sufficient to constitute a cause of action.

William Barnes, for the plaintiff.

M. T. Reynolds, for the defendants.

HARRIS, J. The only question presented by this demurrer, is whether the publication set forth in the complaint is libelous *per se.* The charge is in substance, that the plaintiff, being an

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influential politician in the city of Albany, had in 1840 been paid \$5000 in cash for procuring the appointment of an inspector of pork in the city of New-York, by Governor Seward, and that large sums had also been paid to the plaintiff, for other lucrative offices. Is such a charge calculated to injure the character of the plaintiff, or to degrade him in public estimation? If it is, then the court is required to say, as matter of law, that the charge is libelous. No extrinsic fact need be stated to give point or meaning to the charge. The language of the alledged libel is to be understood as used in the ordinary and most natural sense. Giving this construction to the language used by the defendants, the charge is obviously calculated to degrade the character of the plaintiff in the public estimation. It imputes to him, in terms clear and unequivocal, conduct highly dishonorable if not criminal: such as, to the extent it may be believed, must bring upon him public contempt and indignation. Such a charge does not need the aid of any averment or innuendo to make it libelous.

The plaintiff is therefore entitled to judgment upon the demurrer, with liberty to the defendants to answer within twenty days on payment of costs.

[ALBANY SPECIAL TERM, June 2, 1851. *Harris*, Justice.]

CROOKE & FOWKS *vs.* H. W. T. MALI, and H. MALI.

It is too late to raise, in the appellate court, an objection not made in the court below. The objection, if it in reality existed, might have been obviated if mentioned at the trial.

The appellate court will intend that every thing necessary to sustain the verdict was proved, unless the omission was taken advantage of by exception in the court below.

A promissory note, delivered to an insurance company for premiums in advance, given according to the provisions of the charter of the company, authorizing it to receive such notes, is an available security, and valid in the hands of the company.

And if such note be pledged by the company as security on an advance of money to its full amount, to the company, which advance it is unable to repay, the party to whom the note is so pledged may recover the amount thereof, in an action against the maker.

By a resolution of the board of trustees of an insurance company, their president was authorized to raise funds for the payment of the debts of the company, on the pledge of its assets. At that time the company held a promissory note for \$3000, not yet due, and for which the makers, after the passage of the resolution, and at the request of the president, substituted *two other notes*, in the aggregate of equal amount. Subsequently, the president borrowed money on the note of the insurance company, pledging *one of these notes*, together with other assets of the company, as collateral security. The company failed, leaving the money so borrowed unpaid, and the lender brought a suit on the note so pledged. *Held*, that he was entitled to recover against the makers of that note, although it appeared on the trial that the balance of the account between themselves and the company, was in their favor, to an amount larger than the amount of the note in suit. *Held*, also, that if a resolution was required to render the pledge in this case valid, the substituted notes would seem to be as much within the resolution, as the original note, in whose place they were put.

Whether the general agency, belonging to the situation of president of such a company, would not extend to authorize the borrowing of money on a pledge of its securities, for the payment of its ordinary business debts? *Quære.*

THIS case came up on a writ of error to the superior court of the city of New-York. H. W. T. Mali, and Hippolyte Mali, the defendants in error and plaintiffs in the superior court, brought an action against R. L. Crooke and H. Fowks, defendants in that court and now plaintiffs in error, on a promissory note made by the latter, for \$1500. The declaration stated that the defendants made the note payable to their own order,

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that they indorsed the same to the Croton Insurance Company, and that the latter, before the note fell due, indorsed the same to the plaintiffs. The defendants pleaded the general issue, with notice that the note was given to the Croton Insurance Company in advance for premiums to be earned by said company; that the company failed to earn said premiums, and that the consideration of the note failed, of which the plaintiffs had notice when they received it; that they took the note as collateral security for moneys due them by the Croton Insurance Company; and that they would, on the trial, be required to prove the consideration given for the note, and the time when, and circumstances under which, they received the note.

On the trial the jury found a verdict for the plaintiffs for the full amount of the note. The plaintiffs proved on the trial that the defendants made the note; that the same was indorsed and delivered to the plaintiffs by the president of the Croton Insurance Company; also the amount due on the note; and the charter of the Croton Insurance Company—omitting, however, to prove any indorsement by Crooke & Fowks, to whose order the note was payable.

The defendants moved for a nonsuit, on the ground that the plaintiffs, in order to entitle themselves to recover, should show that the note was negotiated to them according to the authority given in the charter of the company, and for some purpose therein mentioned; which motion was denied, and the defendants' counsel excepted; taking no exception, however, to the plaintiffs' omission to prove any indorsement of the note by Crooke & Fowks. The counsel for the defendants then called as a witness, the former secretary, (*Nicholas Carroll*), and the former president (*James G. Stacey*), of the Croton Insurance Company, and proved by them that the company failed May 15, 1846; that the note in suit, bearing date February 7, 1846, for \$1500, and payable six months after date, had been given by the defendants to the Croton Insurance Company, together with another note of the same date, and payable at the same time, but for the sum of \$1501,20, in exchange for a note of \$3001,20, bearing date February 7, 1846, and payable in twelve months,

originally given by the defendants to the company, as a subscription note for premiums in advance; and that the substitution of the two notes took place about 1st March, 1846. It also appeared that the defendants had, with others, agreed to give certain notes for premiums in advance, in order to assist the company in paying their indebtedness, and to induce parties to effect insurance with the company, of which the note for \$3001,20 was one, afterwards changed into two notes as above stated; and that by a resolution of the board of trustees, passed on or about the 27th February, 1846, the president had been authorized to raise funds for the payment of the debts of the company, on the pledge of the assets of the company. That the company, on 1st March, 1846, borrowed from the plaintiffs \$8000, payable in 30 days, on their own note, giving at the same time the note in suit, and another note of one Silas Wood, for \$1500, as collateral security. It further appeared that this was done in order to obtain money to pay losses then due by the company. The plaintiffs offered to surrender the note given by the company, and proved that it had not been paid, and that the company was insolvent.

It further appeared, that the defendants had given several notes to the company for premiums in advance, and that the balance of the account between themselves and the company was in their favor, to an amount larger than the amount of the note in suit. Also that one of the plaintiffs, as well as one of the defendants, had been a trustee of the Croton Insurance Company, at the time the note in suit was given and transferred.

The defendants' counsel contended, that the note in question had never been given, nor negotiated, within the charter of the company.

The judge charged the jury, that the note, taken under the circumstances described by the witnesses, was valid, and founded on good consideration; and if passed to the plaintiffs, under the circumstances stated by the president of the company, it was a valid and effectual negotiation of the note, within the provisions of the charter, to which charge the defendants' counsel excepted.

The case was submitted at the February general term, 1851,

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without argument, upon the points prepared by the counsel for the respective parties.

P. S. Crooke, for the plaintiffs in error. 1. The authority of the Croton Insurance Company to "negotiate" notes given in anticipation of premiums, did not authorize the transfer of the note in question. The note never was indorsed by the payees, and was imperfect. The company did not "negotiate" this note; they negotiated a loan from the plaintiffs on their own note, giving the note in question as collateral security. 2. This note being above the value of \$1000, its transfer was illegal, unless previously authorized by resolution of the board of directors. This note had no existence at the time when the resolution of the board of directors was passed, upon which the plaintiff relies to justify its transfer. The board could not authorize the transfer of that which they had not. 3. The resolution itself is invalid, for its generality. It should have specified the assets of which it authorized the transfer. It is also invalid, as it authorized an assignment of all the assets as security for the contemplated loan. It is also invalid, under section 9, art. 1, title 2, chap. 18, part 1, of the revised statutes. The exchange of Crooke & Fowk's note for \$3000, for two of \$1500 each, was made without the concurrence of the board of directors, and was, therefore, illegal and void. One of the plaintiffs was a director, and knew that the Croton Insurance Company was insolvent at the time of the loan made by the plaintiffs. The assignment of the note clearly shows that the insolvency of the Croton Insurance Company was contemplated by the parties. It would be of no effect, and of no benefit to the plaintiffs, unless the company became insolvent within thirty-three days, and was made with a view to the protection of the plaintiffs in that event. (1 *R. S. part 1, chap. 18, title 4, sec. 4.*)

T. Sedgwick and *Edward Sandford*, for the defendants in error. I. The note in question was a valid note, by force of the statute authorizing it to be taken, and a partial failure of consideration can not be set up to defeat a recovery of the full

amount. (*Deraismes v. The Merchants' Mut. Ins. Company*, 1 Comst. 371. *Brouwer, receiver, &c. v. Crooke & Fowks*, affirmed in court of appeals.) (a) II. The concurrence of others in giving similar notes for the purpose of giving a credit to the company, in pursuance of an agreement entered into by all the makers; the contemplated advantages of insurance in such company, and the compensation authorized to be paid to the makers on such amount as the note should exceed the premiums on insurance actually taken, constitute a sufficient consideration to uphold the note. (*See cases under the first point. Brouwer, receiver, &c. v. Hill*, 1 Sandf. Sup. Ct. Rep. 629.) III. The defendants in error are *bona fide* indorsees of the note in question. IV. The omission of the indorsements on the note is a clerical error in engrossing the bill of exceptions. This appears by the original note, which is herewith exhibited to the court as it was produced at the trial, with its indorsements, by which it will be seen that it was indorsed by Crooke & Fowks in blank. The declaration alleges the indorsement: it was made payable to the order of the drawers: it was not operative until indorsed by them. *Nicholas Carroll* (former secretary of the Croton Insurance Company,) proves its execution, which necessarily includes signing and indorsing. He proved, also, the indorsement by *Stacey*, president of the Croton Insurance Co. The proof is full that the note was indorsed to and was held by the Croton Insurance Co., and the *only point made at the trial* was, that the subsequent indorsement of the note by the company to the plaintiffs, was not proved to have been made in conformity with the charter of the company, and for the purpose therein stated. The judge instructed the jury upon the only two points made; 1. That the note *taken by the company*, under the circumstances stated, was valid, and founded on good consideration; 2. That if the note passed to the plaintiffs, under the circumstances stated by the witness *Stacey*, it was a valid and effectual negotiation of the note, within the provisions of the company's

(a) This case is reported in 4 Comst. 51-55, under the title of *Brown v. Crooke*.

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charter. V. No objection having been taken to the want of proof of the indorsement by the makers, and it appearing by the bill of exceptions that the cause was tried on the assumption on the part of the defendants, that the Croton Insurance Company became, and were, the regular holders of the note in question, so far as it regards their formal title, the objection can not be taken on writ of error. Where the objection is one which the party may have it in his power to remove, the precise ground of the objection must be stated, that notice may be given to the court and the party. (*Dunham v. Simmons*, 3 Hill, 609. *Simpson v. Downing*, 23 Wend. 316, 318, 319. 2 Cowen & Hill's Notes, 787, 788, 790. 1 Id. 256, note 246. *Bernard v. Vignaud*, 10 Mart. Lou. Rep. 633, 637, 638.) VI. It having been decided by the court of appeals that notes similar to the note in question were valid in the hands of the company, it is not competent for the plaintiffs in error to raise the question whether the defendants in error acquired any sufficient title to the note in suit, by the transfer from the company. It was indorsed in blank by the plaintiffs in error, and the title to it, thereafter, passed by mere delivery. It was proved to have been delivered to the defendants in error. If they are not the legal holders, and entitled to the proceeds, they may sue upon it as trustees for the legal holder. Having possession of it by consent of the parties entitled to it, (if they be not so entitled) they are authorized to receive payment of it. (*Paley on Agency*, Dunlap's ed. 273, 274. *Whitlock v. Waltham*, 1 Salk. 157. *Owen v. Barrow*, 1 B. & P. N. Rep. (4 Bos. & Pul.) 101, 103. *Gage v. Kendall*, 15 Wend. 640. *Lovell v. Evertson*, 11 John. 52.) VII. If it be material in the case whether the passing of the note to the plaintiffs below, under the circumstances proved, constituted a valid and effectual negotiation of the note, within the provisions of the charter of the company, the charge of the judge was correct. The charter of the Croton Insurance Company (*Laws of 1843*, p. 56) embraces all the powers, privileges and restrictions granted and imposed upon the Atlantic Mutual Insurance Company. (*Laws of 1842*, p. 261.) This confers the general powers enumerated in title 3, chap. 18 of the first part of the revised

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statutes. By § 12 of the charter it is provided that the company may receive notes for premiums in advance, and may negotiate such notes for the purpose of paying claims, or *otherwise*, in the course of its business. The case shows that this note was negotiated to raise money to pay losses sustained by the company, on the 1st of March, 1846, and on the 8th of March the company paid Crooke & Fowks \$2000 for a loss. The resolution of the board authorizing the president so to borrow money, was proved, Mr. Crooke being present. The \$3000 note was divided for this purpose, both partners acting in the business. (*Angell & Ames on Corp.* 125, 2d ed.) VIII. The judgment of the superior court should be affirmed with costs.

By the Court, KING J. It is urged by the counsel for the plaintiffs in error, as a reason for reversing the judgment of the superior court, that it does not appear that the note in suit was ever indorsed by them. This objection seems to be too late: however, it was assumed on the trial, that the note was properly indorsed by the plaintiffs in error; and the only point raised, was as to the transfer of the note, by the Croton Insurance Company to the defendants in error. The objection, if it in reality existed, might have been obviated, if mentioned at the trial; and we must now intend, that every thing necessary to sustain the verdict was proved, unless the omission was taken advantage of by exception in the court below. (*Jenks v. Smith*, 1 *Comst. R.* 90. *Henry v. The Bank of Salina*, 1 *Id.* 83. *Holbrook and others v. Wight*, 24 *Wend. R.* 169.) A similar principle is applicable to the objections, which seem now to be raised for the first time, that the transfer of the note by the company to the defendants in error, was void, as made in contemplation of insolvency, and with intent to give a preference, contrary to 1 *R. S.* 3d ed. p. 722, § 9; and p. 734, § 4.

The only question raised in the court below, seems to have been this, that the note was not negotiated by the company according to the authority given to them in their charter, and for some purpose therein mentioned. It appears that the note was one for premiums in advance, given according to the provisions

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of the 12th section of the charter of the company, (*Laws of 1843, p. 66; and Laws of 1842, p. 263;*) that it was pledged as security on an advance of money to its full amount to the company, which advance the company is unable to repay. And the cases of *Deraismes v. The Merchant's Mutual Ins. Co.* (1 *Comst.* 371;) and of *Howland & Aspinwall v. Myer*, (3 *Id.* 590;) seem decisive of the right of the defendants in error to recover in this action.(b)

In the latter case no resolution of the board of trustees authorizing the transfer of the note in suit was shown, though it appeared that the by-laws authorized the president to transact all the ordinary business of the corporation. In the present case no by-law is shown, but it appears that there was a resolution of the board of trustees authorizing the pledge of its assets to raise money to pay its debts; even if the general agency belonging to the situation of president of the company, would not extend to authorize the borrowing of money, on a pledge of its securities, for the payment of its ordinary business debts.

It is objected by the counsel for the plaintiff in error that the resolution of the board which was proved, did not authorize the transfer of the note in suit, as it did not then exist. It appears that on the 7th February, 1846, the plaintiffs in error gave their note to the company payable at 12 months, for \$3001,20. That on the 27th February, 1846, the resolution authorizing the pledge of the assets of the company, was passed; and that afterwards, the plaintiffs in error substituted two notes, one being the note in suit, in place of the original note for \$3001,20. If a resolution was required to render the pledge, in this case, valid, the substituted notes would seem to be as much within the resolution as the original note, in whose place they were put.

The judgment of the superior court should be affirmed, with costs.

[NEW-YORK GENERAL TERM, June 14, 1851. *Edmonds, Edwards and King, Justices.*]

(b) See the case of *Brouwer, receiver of the Croton Insurance Co. v. Crooke & Brooks*, (4 *Comst.* 51 to 55;) reported under the title of "*Brown v. Crooke*," in which the principle of the case of *Deraismes v. The Merchant's Mutual Insurance Company*, (1 *Comst.* 371,) is re-affirmed.

THE SACKET'S HARBOR BANK vs. THE PRESIDENT, ETC. OF
THE LEWIS COUNTY BANK.

The sale, by a bank, of a quantity of butter, which it had received in settlement of a debt due to it, is no violation of the provision in its charter, that it shall not directly or indirectly deal or trade in buying or selling any goods, wares, merchandise or commodities whatsoever, unless in selling the same when truly pledged by way of security for debts due to the said corporation.

And the purchase of the butter, by another bank, having a similar restrictive clause in its charter, it appearing to be an isolated transaction of buying on the part of such bank, is not within the restriction which prohibits dealing or trading in buying or selling any goods, &c., but is a lawful transaction.

THIS was an action brought by the plaintiffs against the defendants on their guaranty, in writing, of certain inland bills of exchange, therein specified, amounting to \$19,012,69, with all damages and costs that might arise or accrue by reason of the non-payment by the acceptors, or drawers, or indorsers, and waiving notice of demand and protest on any or all of said bills. The declaration also contained counts for goods, wares and merchandise, sold by the plaintiffs to the defendants, to the amount of \$25,000; the usual money counts, to the same amount in each, and also a count on an *insimul computassent*. To this declaration the defendants pleaded the general issue. The cause was tried at the New-York circuit in May, 1848, before H. P. Edwards, circuit judge, and a jury. On the trial the plaintiffs proved, by the cashier of the defendants, that the guaranty upon which the suit was brought, was executed by John W. Martin, who was at the time president of the Lewis County Bank. They also proved that the guaranty was in March, 1842, and that previously, in the fall of 1839, the board of directors of the said Lewis County Bank passed a resolution that the president be authorized and empowered to guaranty and indorse any notes, bills of exchange, or other evidences of debt which that bank might hold, and negotiate the same for the benefit of that institution. The plaintiffs also proved, that in March, 1842, in order to secure a debt then due to them by a mercantile firm in the city of New-York, they were obliged to

Sacket's Harbor Bank v. President, &c. of Lewis Co. Bank.

take a quantity of butter to the amount of upwards of \$10,000; that they sold this butter to the defendants, which, together with the sum of \$9,000 in cash paid by the plaintiffs, at that time, to the defendants, formed the consideration for the bills of exchange so sold by the defendants to the plaintiffs; and the payment whereof was so guaranteed as aforesaid. The plaintiffs also proved that the bills of exchange were not paid at maturity; excepting the three first mentioned in the guaranty, and amounting to \$7,012,69, which they admitted were paid when due. And they claimed to recover, either on the counts upon the guaranty, or on the common counts, the amount due on the other bills of exchange, or the balance of the aggregate of the said \$9,000 cash advanced, and of the amount of said butter sold at the agreed prices, deducting therefrom the amount of said three drafts, which were admitted to be paid. And the plaintiffs having rested, the defendants moved for a nonsuit; and the justice who tried the cause decided that the contract between the plaintiffs and defendants, (out of which the guaranty arose,) being in part for the sale and purchase of butter, was void; and that the plaintiffs could not recover on said guaranty, and could not recover for the price of said butter or any part thereof; and he ordered the plaintiffs to be nonsuited. The plaintiffs excepted, and filed a bill of exceptions.

C. P. Kirkland, for the plaintiffs.

H. W. Robinson, for the defendants.

By the Court, KING, J. The 5th section of the plaintiff's charter provides that said corporation shall not, directly or indirectly, *deal* or *trade* in buying or selling any goods, wares, merchandise, or commodities whatsoever, unless in selling the same, when truly pledged by way of security for debts due to the said corporation. The charter of the defendants contains a similar provision. It appears from the case, that the plaintiffs obtained the butter—the selling of which is held to constitute the illegality of their contract with the defendants—in settlement of a debt

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due them by Gordon & Brown; and thus, it seems to me, they had, even within the terms of their charter, power to sell it.

As to the incapacity of the defendants to buy. The object appears to have been to borrow from the plaintiffs, money for the defendants' purposes. The plaintiffs had some money and some butter which they had a right to sell. The defendants agree to take the butter at its market price, and also money of the plaintiffs, and repay them at a future day, the amount of money loaned, and the price of the butter.

It appears to have been an isolated transaction of buying on the part of the defendants, and of selling on the part of the plaintiffs, and hardly within the restriction of the charter which prohibits dealing or trading in, buying or selling goods, &c.; and moreover, a lawful transaction, within the principle of *Potter v. The Bank of Ithaca*, (5 Hill, 490,) where, under an express direction that the discount operations of the bank should be conducted at Ithaca, and not elsewhere, a single discount made within the city of New-York, was not considered within the prohibition; and to the same principle see *Suydam v. The Morris Canal and Banking Company*, (5 Hill, 491, note (a); S. C. 6 Hill, 217, in error.)

For this reason it seems to me, the contract between the plaintiffs and the defendants was not void, and the nonsuit should not have been allowed; and therefore, that the motion for a new trial should be granted.

[NEW-YORK GENERAL TERM, JUNE 14, 1851. *Edmonds, Edwards and King, Justices.*]

 MEAKIM vs. ANDERSON.

In an action upon a promissory note, a total failure of the consideration of the note, or that it was given without consideration, may be proved on the trial, under the plea of the general issue, without notice.

The testimony of a witness on the trial, that some years previous he had received a letter from the plaintiff in the action; that he had searched for it

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among his file of letters and other papers, and in every other place where he could think it might be, and could not find it; that he did not think he had seen it since he received it, and that he believed it to be lost; is sufficient proof of loss to admit parol evidence of the contents of such letter.

It is in the discretion of the judge who tries the cause, to permit or refuse the re-examination of a witness who has been examined and cross-examined, and permitted to leave the stand; and the court, at the general term, will not review the exercise of his discretion.

And where the plaintiff wished to recall a witness, originally introduced by the defendant, that he might explain part of his testimony, on the ground that it had been misunderstood; and the judge stated that the witness had, both in his original and cross-examination, made the statement which he desired to explain, and that he did not think proper to permit such explanation when there was no doubt as to what the witness stated, and after a conference, by the witness, with the plaintiff's counsel, it was deemed a proper exercise of his discretion.

A general exception to the charge of the judge will be unavailing, where it is not perceived that any error of law is committed in the charge, and the whole dispute in the case is on a question of fact, and that is left to be determined by the jury.

Testimony to impeach a witness does not furnish ground for a new trial, when applied for upon an allegation of newly discovered evidence.

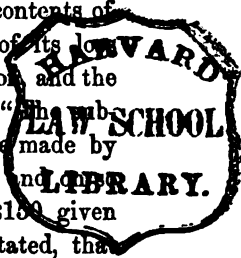
A new trial will not be granted to a plaintiff on the allegation that he was surprised, on the trial, by the evidence of a witness for the defendant, when it appears that he was informed by the defendant, before the suit was brought, that his defense would be the fact stated by the witness, and that he was also at the same time informed by the witness what the fact was; and his testimony on the trial corresponded with his previous statement to the plaintiff.

THIS was an action commenced May term, 1846, by the filing of a declaration pursuant to the statute, on a note to the plaintiff for \$89 with interest, executed by the defendant Daniel M. Anderson as principal, and the defendant John Anderson as surety, payable eight months after date, and dated 20th April, 1842. The defendants severed in their defense, and each pleaded the general issue only, without any notice of special matter.

The cause was tried at the New-York circuit in March, 1848, before Justice Edwards and a jury. On the trial the plaintiff proved the execution of the note and the amount then due upon it, and rested. The defendant's counsel, in his opening, stated to the jury that his defense would be that the note sued on was

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without any consideration, and that there was a total failure of consideration, and that the note in suit was given for a debt which had been paid, and which fact was not known to the defendants at the time the said note was given. The plaintiff's counsel objected to the introduction of such defense, on the ground that the pleadings furnished no notice of it, and no special notice of the same had been given. The objection was overruled by the court, and the plaintiff's counsel excepted. A witness, *Alpheus Dimmick*, was then sworn and examined on the part of the defendant, who testified that he resided at Bloomingburgh, Sullivan connty; that the body of the note offered in evidence was in his hand-writing; that he received a letter from the plaintiff at the time the note was drawn; that the plaintiff then resided on Long Island and the defendants at Bloomingburgh; that the letter was lost. On being examined by the plaintiff's counsel as to the loss of the letter, the witness said, "I have searched for it among my file of letters and other papers, and in every other place where I could think it might be, and can not find it. I do not think I have seen it since I received it. I believe it to be lost." The plaintiff's counsel then objected to the introduction of parol evidence of the contents of the letter, on the ground that no sufficient evidence of its loss had been furnished. The court overruled the objection, and the plaintiff's counsel excepted. The witness then said, "The substance of the letter was, that I was to receive a note made by Daniel M. Anderson, with John Anderson as surety, and in doing I was authorized to discharge a mortgage of \$100 given by Mary Thompson." The same witness further stated, that finding he had no authority to give a satisfaction, he drew the satisfaction piece and sent it to the plaintiff by mail to have it acknowledged at his residence, and it was returned to the witness by mail, and he then procured it to be put on record, and took the note in question. He also stated that Mary Thompson was married to Daniel M. Anderson, one of the makers of the note, before the note was given. Another witness of the defendants, *Jacob C. Thompson*, testified to many interviews between Mary Thompson and the plaintiff; one in the fall of 1834, when the



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witness made some settlement upon a note she, Mary Thompson, had given the plaintiff, to the amount of somewhere about \$100; and he was also present at an interview between them at Bushwick, a couple of years afterwards, perhaps, and then made a settlement between Mary Thompson and the plaintiff; calculated the interest on some indorsements which had been made on a former note, and a new note signed by Mary Thompson was given for the balance. She said that if Samuel Thompson had paid the plaintiff so much money, she would not have owed the plaintiff any thing; plaintiff said Samuel had not paid him; she was much grieved and mortified because Samuel had not paid over the money to the plaintiff, and shed tears. Witness did not know how much money she said she had given to Samuel Thompson; he presumed that the new note which he drew, as above stated, was not for \$100, but it was over \$80. This was the last interview before Mary Thompson died. There were some little accounts between her and the plaintiff besides the note; the plaintiff had from time to time lent her money, and she paid him in different ways, in produce, such as butter, cows, &c. Samuel Thompson was then called, and being sworn, said: Mary Thompson gave him some money to take to the plaintiff thirteen or fourteen years ago (the then) last December; the amount was over \$90, to pay off a note which she said the plaintiff held against her; he paid it to the plaintiff, he thinks it was thirteen years ago that month (of the trial); this witness said he never saw Mary Thompson after that, nor was ever up where she lived until after her death. He first saw the defendants two years ago (the then) last January, and told them he had paid the money to the plaintiff. On his cross-examination, the witness said: he carried the money from Mary, she did not give him all money, \$30 in gold, and a note drawn in her favor by Mr. Beyea, for about \$60. He made the payment to the plaintiff by giving him three cows and a horse; it was in Flushing, Long Island; he sold the cows and exchanged horses, and the plaintiff gave him \$120 boot, and took a wind mill; the witness did not recollect what amount of cash was given at that time; this was in March, about the 20th, he did not see the note at

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that time, he saw the note before that, there was no receipt taken by the witness; the plaintiff said he would cast it up, and settle with the witness' sister, when she came down; she never inquired of the witness whether he had paid that money, nor ever wrote to him to inquire; she lived in Bloomingburgh, Sullivan county, and he resided in Flushing. It also appeared in evidence, that at the time the note in suit was given, (April 20, 1842,) Mary Thompson (then the wife of the defendant Daniel M. Anderson,) was living, and that she died in the autumn ensuing; that she obtained sums of money, from the plaintiff at different times, from 1833 to 1839, or 1840. The plaintiff's counsel then offered to recall Jacob C. Thompson, a witness for the defense, for the purpose of enabling that witness to explain a material part of his testimony; the counsel stating that the witness' testimony on the point in question had been misunderstood, and taken to convey a meaning which the witness had not intended. The court then asked the counsel as to what fact he wished to examine the witness, and the counsel having stated the fact, the court remarked, that there could be no misunderstanding as to what the witness had stated, for he had sworn positively to the fact, both in his direct and cross-examination, and that the court could not permit a witness who had thus sworn to be recalled, at the request of a party, to contradict his positive statement after he had been conferred with by the counsel for the party wishing to recall him. To this decision the counsel for the plaintiff excepted; the parties rested, and the judge charged the jury that the action was brought on a note, the defense was want of consideration; that proof of the signatures was sufficient to establish the plaintiff's case, unless there was evidence of want of consideration; in this case the note in question was given for a balance alledged to be due on an old mortgage, Mr. Dimmick [the first witness for the defense] stated that he procured a satisfaction piece of the mortgage from the plaintiff, and took the note in satisfaction of the mortgage, and there was no evidence to the contrary that if the amount was due on the mortgage it was a good consideration. That Jacob Thompson testified, that at a settlement in Bushwick,

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when a note was given by Mary Thompson, she said that if Samuel Thompson had paid the plaintiff the money she gave him, she would not owe him [the plaintiff,] and that the plaintiff said the money had not been paid, and that she seemed to be much mortified that it had not been paid. It was claimed by the defendants that if this had been paid, there was nothing due on the mortgage, and the consideration failed. The object of the plaintiff was to show that there were other transactions. It was claimed by the plaintiff that he never had received the money. If it was a fact, that at that settlement at Bushwick, the money alledged by Samuel Thompson to have been paid to the plaintiff was not credited to Mary, and the jury believed his testimony, then it was for the jury to say whether, in connection with the other testimony, there was evidence of a failure of consideration for the note or not. The whole matter was a question of fact, and was all within the peculiar province of the jury to determine. The plaintiff's counsel requested the judge to charge as matter of law, that, conceding the payment to have been made by Samuel Thompson, as testified to by him, (which fact of payment the plaintiff denied,) if a further advance of money was made by the plaintiff to Mary Thompson, when she gave the note at the Bushwick settlement, and that note was exchanged for the note now in suit, such further advance afforded a consideration for the latter note, which the jury were not at liberty to disregard, and in such case the evidence offered by the defendants proved, at most, only a partial failure of consideration, which the defendants were not at liberty to go into, without giving notice of it with their plea. The judge told the jury, that if the money was paid, as testified to by Samuel W. Thompson, and no credit was given; and if the jury believed that the payment was larger in amount than the amount due to the plaintiff, at the time the note in suit was given, the plaintiff could not recover, unless there was some other consideration; and that it was for the jury to say whether there was any such consideration. To this, and to every part of the charge, the plaintiff's counsel excepted. The jury rendered a verdict for the defend-

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ants, and the plaintiff's counsel had leave to make a case, with liberty to turn it into a bill of exceptions.

On the case so made, the plaintiff moved to set aside the verdict in favor of the defendants on the ground of misdirection of the judge at the trial; and also moved, on affidavits, for a new trial on the ground of newly discovered evidence, and surprise on the trial, by the evidence of Samuel W. Thompson. The affidavits were of Hugh T. Meakim, son of the plaintiff, and of Nancy Bedell, daughter of the plaintiff, and an affidavit of the plaintiff himself. The affidavits of the son and daughter, were in contradiction of the statement of Samuel W. Thompson, that he had not seen his sister, Mary Thompson, since March, 1835, the time when he stated he had paid the money to the plaintiff; and affirming that he had repeatedly seen his sister at the house of their father, the plaintiff, in Newtown, in the months of May and June, 1836, and also at his house in Bushwick, in the year 1838. The plaintiff himself also made an affidavit, that he was surprised, on the trial of the cause, by the evidence of Samuel W. Thompson; and that he was not at that time aware of the existence of the newly discovered evidence set forth in the preceding affidavits, (his son's and daughter's.) The defendant, Daniel M. Anderson, made a counter-affidavit, stating that some time early in the year 1846, Samuel W. Thompson, one of the witnesses in this case, was on a visit at the defendant's residence, in Mamaroneck, Sullivan county, and then informed the defendant that he had paid to the plaintiff the money which Mary Thompson, his sister, had given him for the plaintiff, (and as was by him, sworn to on the trial of the cause;) that this was the first intimation that he, Anderson, had of this payment; that soon after that, and during that winter, he went to the plaintiff's residence on Long Island, and told him the whole statement as made by the said Samuel Thompson; and which was the same, too, as that made by Samuel, under oath, on the trial of the cause. The defendant also stated in his affidavit that in the month of March, 1847, he again told the plaintiff the same statement of Samuel, and the next day, they all three, the plaintiff, the said Samuel

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W. Thompson, and the defendant Daniel M. Anderson, had an interview in the city of New York, and that Samuel then told the plaintiff, that he, Samuel, had paid him, the plaintiff, the money which his sister, Mary Thompson, had given him for the plaintiff, and detailed to the plaintiff the time and manner in which he, Samuel, had paid it to him. That at that interview the defendant told Samuel that his sister Mary had died in the belief that he, Samuel, had never paid this money to the plaintiff, and Samuel seemed much affected, and insisted upon it, that he had paid it to the plaintiff, and that he, plaintiff, knew it. The defendant also swore to other interviews with the plaintiff, before the trial, in which the matter of Samuel W. Thompson's statement, as aforesaid, and the said note was fully talked over. He also stated in his affidavit, that Hugh T. Meakim had always lived with his father, the plaintiff, until about the spring of 1849; and that Nancy Bedell, at the time of the trial, and for some two years before, lived near, and about one-quarter of a mile distant from the plaintiff.

W. S. Rowland, for the plaintiff.

Geo S. Stitt, for the defendant.

By the Court, KING, J. Two motions are made on behalf of the plaintiff—a motion to set aside a verdict in favor of the defendants, the cause having been tried at the circuit in March, 1848—for alledged misdirection of the judge at the trial; and also, a motion for a new trial, on the ground of newly discovered evidence.

The first exception taken by the plaintiff's counsel was, that the judge permitted the introduction of evidence to show a total failure of consideration of the note on which the action was brought, the defendant having pleaded the general issue, and given no notice of this defense. The exception was not properly taken, it being well established that a total failure of the consideration of a note, or that it was given without consideration, may be proved under the general issue, without notice. (*Payne v. Cutler*, 13 *Wend.* 605.)

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The second exception was, that parol evidence of the contents of a letter had been admitted, without sufficient proof of the loss of the letter. It seems to us that the proof of loss was sufficient, and that the exception was properly overruled.

The third exception was to the judge's refusal to recall, upon application by the plaintiff, a witness originally introduced by the defense to explain part of his testimony, on the ground that it had been misunderstood. The witness had been examined and cross-examined, and permitted to leave the stand; and had subsequently conversed with the plaintiff's counsel. The judge stated that the witness had, both in his original and cross-examination, made the statement which he desired to explain, and that he did not think proper to permit such explanation, when there was no doubt as to what the witness stated, and after a conference with the plaintiff's counsel. It was in the discretion of the judge to permit, or refuse, the re-examination; the discretion seems to have been properly exercised, and the exception should be overruled on that score, even if we could now review the exercise of his discretion. (*People v. Rector*, 19 *Wend.* 578. *Law v. Merrills*, 6 *Id.* 281.)

The fourth exception is a general one to the charge of the judge. We do not, however, perceive that any error of law was committed in the charge. The whole dispute in the case was on a question of fact, and that was left to be determined by the jury.

As to the motion for a new trial, on the ground of newly discovered evidence and surprise; it appears from the affidavits in opposition to the motion, that the plaintiff, before the trial, was aware that Samuel W. Thompson claimed to have paid him the money which his sister Mary had given him to pay the plaintiff; and that he had never seen his sister after such payment. This does away with the plaintiff's statement, that he was surprised by this evidence. The testimony which he claims to have discovered since the trial, is that of his own son and daughter, and only tends to impeach Samuel Thompson's statement, that he had never seen his sister, after his paying the money to the plaintiff. It is testimony, therefore, to impeach the witness, and such testimony does

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not furnish the ground for a new trial. Nor is any sufficient excuse shown why it was not adduced at the trial, the plaintiff having been apprised of the necessity of rebutting Samuel W. Thompson's testimony, if he could do so.

The motion to set aside the verdict must, therefore, be denied, with costs.

And the motion for a new trial, on the ground of surprise, &c. must be denied with \$10 costs.

[NEW-YORK GENERAL TERM, June 14, 1851. *Edwards, Edmonds and King, Justices.*]

SHARP vs. CROPSEY.

Although a step-father is not bound, in law, to support his step-children, yet if he acts the part of a father towards them, and does support them, the law will not imply on their part, a promise to pay him for such support.

His assumed relation of father entitles him, on the one hand, to their services without compensation; and entitles them, on the other, to their support and education, without remuneration.

In such cases, the step-father and step-children will be deemed to have dealt with each other in the character of parent and child, and not as strangers; without obligation, on the part of the father to pay for his children's services, or on the part of the children to remunerate their father for their support.

The case of *Gay v. Ballou*, (4 *Wend.* 403,) so far as it holds that a step-son is liable either upon an implied promise, or upon an express promise during his minority, to pay for necessities furnished by his step-father, must be considered as *overruled*.

WRIT of error to the New-York common pleas. This was an action brought by J. F. Cropsey against William H. Sharp, for board, lodging, &c. The defendant, by his guardian, pleaded infancy; the plaintiff replied, that the board, &c., were necessities suitable to the estate and condition of the defendant; the defendant rejoined, that they were not necessities, &c. The case was referred to three referees, two of whom found in favor of the plaintiff for \$330, the other referee dissenting. The court

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of common pleas, on motion for that purpose, refused to set aside the report, and a writ of error upon their judgment was now brought to this court.

It appeared from the case, that Cropsey, the plaintiff, married in 1829, the mother of the defendant, then the widow of John Sharp, deceased. The defendant, at the time was an infant of about seven years of age, having been born 19th Sept. 1822. He lived in the family of the plaintiff, and was supported and educated by him, from the time of his mother's second marriage, until about April, 1841. The plaintiff's claim was for board from September, 24, 1836, to February 1, 1851; besides money paid for necessaries for the defendant, in 1841. In 1839, at a meeting in relation to some property which belonged to the children of John Sharp, inherited from their paternal grandmother, the plaintiff produced to the defendant a bill for his board from September 24, 1836, to August 1, 1831, and from September 3, 1837, to November 3, 1839, amounting to \$354; which bill the defendant admitted to be correct, and requested Arnold Nelson, the witness who testified to this, and who was the defendant's guardian, to pay it. The defendant objected to the introduction of this testimony, but the referees admitted it. Cropsey, the plaintiff, receipted the bill and handed it to the witness, as so much cash on a business transaction between them; and the witness charged the defendant with the amount in his account as his guardian. The receipted bill was afterwards handed back to Cropsey, the arrangement between him and the witness having been rescinded in 1842. It was also proved that the defendant admitted that he had boarded with the plaintiff for the time mentioned in the bill exhibited to him, as above stated, in 1839, and that the prices charged for the board were correct. Evidence was also introduced to show, that in 1830 the plaintiff, Cropsey, and his wife, applied to the court of chancery, stating that Henrietta Cropsey, the wife of the plaintiff and mother of the children, had become largely indebted for their support and maintenance, and praying that an account might be taken of the moneys she had expended, and of the rents and profits of property belonging to

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the children which she had received; and that the account might be stated between her and her children; that it was referred to a master of the court and he stated an account, by which the defendant appeared to be indebted to his mother and his step-father, the plaintiff, in the sum of \$385.48. The report was filed October, 20, 1830, but no further proceedings appeared to have been taken upon it.

A deed was also offered in evidence, by which, in 1841, the children of John Sharp, deceased, conveyed to their mother certain property they had inherited from their grandmother, as a compromise of all claims due her from the children who united in the deed, as well for money advanced to them, as for her expenditures or disbursements for them. The defendant did not unite in this deed, being an infant; but on September 25th, 1843, he executed a deed, to which his mother and the plaintiff were parties, for his interest in the same property; which the plaintiff and his wife agreed to take in full of all claims of Henrietta Cropsey, the mother, for the expenditures and disbursements of said Henrietta for the defendant.

No express promise, on the part of the defendant, to pay the plaintiff for his board and lodging, was proved.

The present action was brought in October, 1842, whilst the defendant was still an infant.

W. C. Noyes, for the plaintiff in error.

Jas. T. Brady, for the defendant in error.

By the Court, KING, J. This is an action brought by a step-father against his step-son, for board and lodging, and other necessities furnished the latter during his minority. The plaintiff married the mother of the defendant, when the latter was seven years old, from which time until near his majority he lived with the plaintiff as one of his family. The defendant's mother and the plaintiff were allowed by the court of chancery maintenance for the infant out of his property, during a portion of his minority: the expenditures now sought to be recovered do

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not seem to have been included in the amount so allowed. The defendant, since he attained his majority, has conveyed to his mother property in satisfaction of any claim she might make against him. This action was brought by the plaintiff against the defendant whilst the latter was still an infant.

The question involved in this case seems to be, whether a step-father who receives into his family, supports and educates the children of his wife, by her former husband, can sustain an action at law against them for the necessities so furnished, without an express promise to pay, made after they have attained their majority; or, in other words, the step-father being under no legal obligation to support his wife's children by her former husband, will the law imply a promise, on their part, to pay him, if he actually does maintain them and furnish them with necessities.

It appears to me that the principles laid down in 5 *Barb. S. C. Rep.* 122, *Williams v. Hutchinson*, and in 3 *Comst.* 312, the same case on appeal, are decisive of the present case.

It is decided in that case, that although a step-father has no right to the services of his wife's children by her former marriage, yet, if he takes them into his family and supports and educates them, he stands in *loco parentis*; and it is against the policy of the law to imply a promise on his part to pay for the services they may render him whilst they remain in his family, and he continues to act the part of a father towards them. The converse of the proposition would seem equally true, and within the same policy; that although the step-father is not bound in law to support his step-children, yet if he acts the part of a father towards them, and does support them, the law will not imply on their part a promise to pay him for such support. His assumed relation of father entitles him, on the one hand, to their services without compensation; and entitles them, on the other, to their support and education without remuneration.

The case of *Gay v. Ballou*, (4 *Wend.* 403,) cited on behalf of the defendant in error, must be considered as overruled, so far as it holds that a step-son is liable, either upon an implied prom-

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ise or upon an express promise during minority, to pay for necessities furnished by his step-father.

The rule would seem to be this, that the step-father is not bound to support his step-children, nor the latter to render him any services; but if he maintains them, or they labor for him, they will be deemed to have dealt with each other in the character of parent and child, and not as strangers, without obligation on the part of the father to pay for his children's services, or on the part of the children to remunerate their father for their support.

The judgment of the common pleas should, therefore, be reversed, without costs to either party in this court.

Judgment reversed.

[NEW-YORK GENERAL TERM. JUNE 14, 1851. *Edmonds, Edwards and King, Justices.*]

CRUIKSHANK vs. BROUWER, Receiver of the Croton Insurance Company.

The Croton Insurance Company was incorporated in April, 1843, commenced business in July, 1844, and continued until May 15, 1846, when it became insolvent. On the 20th of June, 1844, the plaintiff in error gave his note to the company for \$5000, payable in one year, as a premium note, given in advance, in conformity with the 12th section of the charter of the company, and upon which note, or the balance thereof over the amount he should pay to the company for premiums earned, he was to receive five per cent per annum. He effected insurance with the company, and the premiums on the amount of insurance so effected, having been paid by him, were deducted from the face of the note; but he opposed the recovery of the balance, on the ground that the note was void for want of consideration. *Held*, that the note was valid, and that the receiver of the company was entitled to recover the balance due thereon.

THIS case came before the supreme court, on a writ of error to the superior court of the city of New-York. The defendant in error, John Brouwer, the receiver duly appointed of the prop-

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erty &c. of the Croton Insurance Company in the city of New-York, brought an action of assumpsit in the superior court, against Cruikshank, the plaintiff in error, on a promissory note made by the latter to the Croton Insurance Company, for \$5000. The defendant pleaded the general issue. On the trial, the note declared on was proved as follows :

"\$5000.

New-York, 20 June, 1844.

One year after date I promise to pay to the order of the Croton Ins. Co. \$5000, value received. JAMES CRUIKSHANK."

The appointment of the plaintiff as receiver, and the charter of the Croton Insurance Company were also proved. The defendant then proved a receipt in the following words :

"Office of the Croton Ins. Co.

New-York, 15 July, 1844.

The Croton Ins. Co. has received from James Cruikshank his note dated 20 June, 1844, payable one year after date, for \$5000 dollars, for which he is to receive 5 per cent per annum, it being a premium note given the said company in advance, and in conformity with the provisions of the 12th section of its charter."

Which receipt was signed by the president and secretary of said company.

It was also proved that no pecuniary consideration was given for the note, nor any other consideration than that expressed, or referred to in the receipt. That the defendant effected insurance with the company, and insisted on his right to apply the premiums on the note, which was refused by the company ; and he was required to pay such premiums in cash, or short paper, which was paid at maturity. The defendant also offered to prove that when the note was given, it was agreed between the president of the company and the defendant, that it should be surrendered to him at the end of the year ; and that he should only be liable on his note, for his proportion of losses sustained by the company, during the time the note had to run. The plaintiff objected to the introduction of such evidence, and the court sustained the objection. It was further proved, that no interest or compensation was ever paid the defendant on the note ; that

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the note, before its maturity, had been deposited by the company in their bank for collection, but was withdrawn before due.

The plaintiff proved a resolution of the company, passed 8th October, 1844, authorizing the payment of five per cent, according to the 12th section of the charter, on premium notes given in advance. An entry on the first page of the journal of the company was also proved, of sixteen notes of \$5000 each, including the one in suit, as premium notes, for which the respective signers were to receive a compensation of five per cent per annum, as authorized by the 12th section of the charter, and a resolution of the board of trustees.

An entry in the ledger, dated 2d October, 1844, of the same notes and two others, as "stock notes," was proved. The plaintiff also proved, that in conformity with the by-laws of the company, monthly statements of its affairs were laid before the trustees; that in those statements the defendant's note was described, sometimes as a premium note, in advance, sometimes as a subscription or stock note; and these statements were not objected to. That an annual statement of the affairs of the company, dated January 27, 1846, to which the name of the defendant as one of the trustees was appended, was made out and published, in which his note was included among the premium notes in advance; the defendant was not, however, present at the meeting when the statement was laid before the trustees. The plaintiff also proved that the Croton Insurance Company commenced transacting business in July, 1844, issued policies of insurance to an extent exceeding \$5,000,000, and continued business until May 15, 1846, when it became insolvent. That the unpaid losses claimed exceeded \$300,000, and its assets of all kinds, including the defendant's note, amounted to between \$200,000 and \$225,000; that there were unpaid losses, accruing before the maturity of the defendant's note, and policies of insurance issued before that period, still outstanding.

The defendant insisted that the note was given without consideration, for special purposes which had not occurred, so as to call for the sale thereof, and that as now held by the plaintiff, it was inoperative and void. The judge charged the jury, that

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if the note was given by the defendant in the manner and under the evidence stated in the case, it was operative and valid in the hands of the plaintiff, as against the defendant; and that the objections taken by the defendant were not sufficient, in law, to bar the plaintiff's action. The defendant's counsel excepted to the charge. The jury found a verdict for the plaintiff for the amount of the note and interest, deducting the amount of premiums which the defendant had paid to the company.

The bill of exceptions was argued before the superior court, and judgment rendered on the verdict in favor of the plaintiff. Upon that judgment the defendant brought his writ of error to the supreme court.

By the Court, KING, J. The plaintiff in error, on the 20th of June, 1844, gave his note to the Croton Insurance Company for \$5000, payable in one year, as a premium note given in advance, in conformity with the 12th section of the charter of the company, and upon which note, or the balance thereof over the amount he should pay to the company for premiums earned, he was to receive 5 per cent per annum. After the giving of the note, and in July, 1844, the company commenced business, and continued to transact business until May, 1846, when it became insolvent. The defendant effected insurance with the company, and the premiums on the amount of insurance so effected having been paid by him to the company, have been deducted from the face of the note; he now opposes the recovery of the balance, on the ground that the note was void for want of consideration.

The Croton Insurance Company was incorporated in April, 1843, (*Sess. L. of 1843, p. 66,*) and the provisions contained in the charter of the Atlantic Mutual Insurance Company, (*Id. of 1842, p. 261,*) are made applicable to the Croton Insurance Company, excepting certain provisions not affecting the present question. The case of *Deraismes and others v. The Merch. Mu. Insurance Company*, (1 *Comst.* 371,) does not appear to vary, in any essential particular, from the one now before us. In that case the maker of a note given for premiums in advance under the provisions of a charter similar to that of the Croton Insur-

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ance Company, was held liable, upon the insolvency of the company, to pay the full amount of his note, less such part thereof as he had paid the company in cash, for premiums earned; and, in accordance with the decision of the court of appeals in that case, the judgment of the superior court, in this action, must be affirmed.

Judgment affirmed.(a)

[NEW-YORK GENERAL TERM, June 14, 1851. *Edmonds, Edwards and King, Justices.*]

(a) See the case of *Brouwer, receiver of the Croton Insurance Company, v. Crooke and Fowks*, (4 *Const.* 51,) to the same effect.

 TAYLOR vs. HARLOW and PIERSON.

In all instruments of a special character, the general terms which are used, must be construed in reference to the particular terms which form the subject matter of the instrument.

But the court, in giving a construction, will apply the principle that all instruments must be construed according to the spirit as well as the letter.

In a power of attorney given by the plaintiff, (who was the owner of a lot of timbered land) to his agent, the powers particularly mentioned, were "to commence and prosecute any suit or suits, action or actions, which may arise out of, or proceed from any trespass or trespasses, waste or wastes, committed upon the real or personal property, belonging to me, in the town of M.," and to "exercise a sound discretion in the settlement of any trespass or trespasses so committed as aforesaid," &c. The agent settled with the defendants for trespasses committed by them on the lands of the plaintiff in the town of M., before the commencement of any suit against them, and gave them a writing, in the name of his principal, [the plaintiff,] stating the receipt by him, from them, of "sixty-two dollars, in full for timber, and for all trespasses committed by them, or either of them, or their servants or agents on the land of" the plaintiff, "in the town of M." Held, That the agent was authorized to settle for trespasses, &c., as well before, as after, suit brought; and that, as a recovery, or settlement in trespass, would debar the plaintiff of authority to sue in replevin to recover the property taken, so a settlement of the trespass had the same effect, though made before a suit was brought.

Taylor v. Harlow.

THIS was an action of replevin brought by the plaintiff against the defendants, for a quantity of pine boards and plank, sawed, which he alledged they wrongfully took and unjustly detained from him. The defendants pleaded separately. Harlow pleaded *nan cepit*, and gave notice, that he would give in evidence, on the trial of the cause 1. Property in *himself*, and not in the plaintiff; 2. Property in the defendants, Harlow and Pierson, and not in the plaintiff; 3. Property in the defendant Pierson, and not in the plaintiff; 4. That he, the defendant Harlow, since the supposed taking, "and before the commencement of this suit, settled with, and paid the said plaintiff for such taking, and for the said goods and chattels; and that before the commencement of this suit, the plaintiff accepted and received thirty-three dollars, in full satisfaction therefor, and the defendant Harlow asked for a return of said goods and chattels, according to statute." Pierson put in a like plea, and gave like notices. The cause was tried at the Saratoga circuit, in August, 1848, before Willard, justice. On the trial, the plaintiff's counsel proved by Jonathan Whiting, that he owned a saw mill, at which the lumber in question was sawed, from logs drawn to his mill by the defendants, and by their directions. The defendants once said the logs came off the Lord lot, (a piece of wood-land, three miles from the saw mill.) The logs were brought to the mill in the direction from the plaintiff's land, which is very near. The witness went over the plaintiff's land, and found that the logs brought to witness' mill, corresponded in size and quality, with stumps recently made on the plaintiff's land. The witness gave a receipt to the plaintiff, which was produced and read in evidence, for the pine boards and plank, sawed from the logs so brought to his mill by the defendants. With the assent of the witness, and by authority of the plaintiff, Freeman Thomas took one half of the lumber, and drew it to the cars. Before he got the balance away, the defendants claimed and took it away from him, and covered it up in the witness' yard, and took care of it. The delivery of the lumber to Thomas was in August, 1847. The lumber in witness' yard was replevied and delivered to the plaintiff. Freeman Thomas was also called and sworn on behalf

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of the plaintiff, and testified, that he presented an order from the plaintiff, about July 29, 1847, to Mr. Whiting, for the lumber in question. Mr. Whiting delivered him all the lumber, and he drew it to the cars. The defendant, Harlow, threw it off the cars witness was loading, and afterwards the defendants drew it away to the yard of Mr. Jennings. Before the commencement of this suit, he demanded the lumber from the defendants. He appraised the lumber before the sheriff; that he was a judge of lumber, and it was worth \$200. The plaintiff rested his case, and the defendant's counsel moved for a nonsuit, on the ground that the plaintiff had not proved his title to the lumber replevied; which motion the judge denied, and the defendants' counsel excepted. The defendants then introduced and offered in evidence a power of attorney, bearing date 12th August, 1844, executed by the plaintiff under his hand and seal, in the words following: "I hereby constitute and appoint Thomas G. Young of the village of Ballston Spa, my attorney, for me, and in my name, to commence and prosecute any suit or suits, action or actions, which may arise out of, or proceed from any trespass or trespasses, waste or wastes, committed upon the real estate or personal property belonging to me, in the town of Milton, Saratoga county, N. Y. And I hereby authorize the said Young to collect any or all damage which may be awarded in my favor, by means or on account of the committing of any trespass or waste as aforesaid; and in prosecuting said trespasses or waste to judgment, to use all lawful and legal means; and exercise a sound discretion in the settlement of any trespass or waste so committed as aforesaid, as I could of my own proper person, were I present." This power of attorney was recorded in the Saratoga county clerk's office. The defendants' counsel also produced, proved, and offered in evidence, a receipt as follows: "Rec'd, July 15th, 1847, of D. R. Harlow and S. A. Pierson, sixty-two dollars, in full for timber and for all trespasses committed by them, or either of them, or their servants or agents, on the land of Thomas C. Taylor, in the town of Milton. THOMAS C. TAYLOR, by T. G. YOUNG, his attorney." The plaintiff's counsel objected to the reception and admissibility of each of these doc-

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uments as evidence, and the court excluded them; and the defendants' counsel excepted to the decision. The testimony being closed, the defendants' counsel asked leave of the court to submit the cause to the jury, on the evidence, as a question of fact; this was refused, and the defendants' counsel excepted. The judge then directed the jury to find a verdict for the plaintiff for six cents damages, and to assess the value of the property at two hundred dollars. To this direction the defendants' counsel excepted; and the jury rendered a verdict for the plaintiff, according to the direction of the court.

S. P. Nash, for the defendants.

Gerard & Buckley, for the plaintiff.

By the Court, EDWARDS, J. We think that the circuit judge was right in denying the motion for a nonsuit.

The next question which arises is, whether the power of attorney given by the plaintiff, and the settlement which was made under it, were admissible in evidence on the part of the defendants. There is no doubt as to the general principle, that in all instruments of a special character, the general terms which are used, must be construed in reference to the particular terms which form the subject matter of the instrument; and the case of *Rossiter v. Rossiter*, (8 *Wend*, 494,) which was cited on the argument, by the counsel for the plaintiff, illustrates the extent to which this principle is applied to powers of attorney.

It is not disputed that the power of attorney in this case was of a special character, but it is contended that even if it be so construed, the agent of the plaintiff did not exceed his authority. The powers which are particularly mentioned are "to commence and prosecute any suit or suits, action or actions, which may arise out of, or proceed from any trespass or trespasses, waste or wastes, committed upon the real or personal property belonging to the plaintiff, in the town of Milton, Saratoga county, N. Y." And to "exercise a sound discretion in the settlement of any trespass or trespasses, so committed, as aforesaid," &c.

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It is not denied by the plaintiff's counsel that these words would authorize the attorney to settle all suits actually brought for any of the causes stated, but he contends that it was necessary that a suit should be commenced, before a settlement could be made. It will be observed that such are not the terms of the instrument; but even if they were, we think that applying the principle that all instruments must be construed according to the spirit as well as the letter, the attorney would be authorized to make a settlement without the commencement of a suit. If it were otherwise, the result would be, that although a favorable offer of compromise should be made, the attorney could not make a settlement until a writ should be duly issued, but that immediately afterwards, he would have adequate powers for that purpose. In this case, however, to remove all question, the agent was authorized by the very letter of the power of attorney, to make a settlement without reference to a suit being commenced. But it is said, that as the receipt given upon the settlement was in full for the timber which formed the subject of this suit, the attorney exceeded his authority. The object of the power of attorney was to enable the agent to obtain satisfaction for the injury sustained by the plaintiff, in having his timber taken from his premises. He had his concurrent remedies of trespass and replevin. But if he had brought an action of trespass, and recovered damages, or had compromised the suit, he would not have been authorized to sue in replevin to recover the property taken. A recovery or settlement in trespass, would have been a satisfaction for the whole injury. And a settlement of the trespass had the same effect, though made before a suit was brought. We think that the judge erred in excluding the testimony offered, and a new trial must be granted. Costs to abide the event.

[NEW-YORK GENERAL TERM, June 14, 1851. *Edmonds, Edwards and King*. Justices.]

VAN ROSSUM *vs.* WALKER.

An assignment by copartners, of their individual property, as well as their partnership property, to pay the joint debts of the firm, is not, on that account, void.

A prohibition in the assignment, against the assignee's selling on credit, is not, *per se*, evidence of fraud. It may be that such a provision is an unwise one, and one that ought not to be countenanced; and when there are any circumstances which go to show that a forced sale was intended, to the injury of the creditors, it ought to be taken into consideration as an important item of evidence, which, in connection with the other circumstances, would justify the court in setting aside the assignment. But, *it seems*, that this is all the effect which should be given to such a provision.

A provision contained in such an assignment, for the return of the surplus to the assignors, after the payment of their debts, will not render the assignment void.

THIS was an appeal by the defendant, Frederick W. Walker, from an order made at a special term, denying a motion to dissolve an injunction granted by a judge at chambers, to restrain the defendant Walker, and his co-defendants Orlando Fish, Benjamin P. Middleton and Luke A. White, from proceeding to dispose of the property of the defendants, Fish, Middleton and White, or either of them, under color of an assignment made by them to the defendant Walker. The defendants Fish, Middleton and White, were partners, under the firm of Fish, Middleton & Co., and proprietors of the Howard Hotel in the city of New-York; and on the 16th of March, 1850, made an assignment to the defendant Walker, of "all their and each of their lands, tenements, goods, chattels, choses in action, merchandise, money, debts, dues, claims and demands, and evidences of debt, and property of every name and nature whatsoever, belonging to them individually or jointly, and wheresoever situated, except such as is by law exempt from levy and sale under execution:" in trust to the assignee, to take possession of all the property thereby assigned, "and sell and dispose of the same upon such terms and conditions as in his judgment may appear best, and most for the interest of the parties concerned, and convert the same into money, provided always, that the same shall not be sold on a credit." And to collect all debts, &c. and to

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pay, *first*, all the copartnership debts, demands and liabilities whatsoever; *secondly*, to "pay and discharge all the private and individual debts of the said" Fish, Middleton and White, "and of each, any and either of them, whether due or to grow due;" *lastly*, to "return the surplus of the said net proceeds and avails, if any there shall be and remain after the payment of the copartnership and individual debts, and all the just debts and liabilities of said" Fish, Middleton and White, "and of each and any of them aforesaid, to the said" Fish, Middleton and White, "their executors, administrators and assigns."

The complaint of the plaintiff stated, that on the 14th of May, 1850, he recovered a judgment in the supreme court against the defendants Fish, Middleton and White, for \$2103,77, for moneys due on several promissory notes made by them as partners, using the style of Fish, Middleton & Co., to the plaintiff; that the judgment was docketed in the counties of New-York and Kings, and executions thereon issued and delivered to the respective sheriffs of those counties, and which were by them returned wholly unsatisfied; that said judgment remained in full force, and the amount thereof, with interest from May 14, 1850, was then actually due and owing thereon to the plaintiff, over and above all payments, set-offs and other matters of diminution. The complaint also alledged, upon information and belief, that the defendants, or some of them, had property which the plaintiff had been unable to discover and reach by execution; and also, upon information and belief, that Fish, Middleton and White, on the 16th of March, 1850, executed to the defendant, Frederick W. Walker, a deed of assignment; and that Fish, Middleton and White owed sundry individual debts, severally, and also had individual and several property, &c. and that they designed and intended by means of such assignment to hinder the plaintiff or any other creditor from obtaining full satisfaction of any debt against them or any of them; that the deed of assignment, by reason (among other things) of unlawful powers, trusts and provisions therein contained, and of matters appearing upon the face thereof, was unlawful, fraudulent and void. And the plaintiff demanded judgment against the defendants, and that

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the assignment be declared void as against the plaintiff, and that a receiver be appointed, and that an injunction issue against the defendants, &c.

The defendant Walker, in his answer, amongst other things, denied that the assignment was unlawful, fraudulent or void, as against the plaintiff, for any reason, or that it ought to be set aside, or in any way disturbed; and he alledged that on or about the 23d of March, 1850, he paid to the plaintiff, as his full share of a dividend, the sum of \$106,60, which the said plaintiff received as such dividend, with full knowledge of such assignment, which he had never returned or offered to restore. The plaintiff, in his reply, denied that the payment was made to him, or received by him, as a dividend out of the assigned fund under the assignment mentioned in the complaint; and he also denied that he had knowledge, at that time, of said assignment. This reply was sworn to by the plaintiff on the 6th of December, 1850; and on the 18th of January, 1851, the defendant Walker made an affidavit, wherein he alledged that the payment which he made to the plaintiff, as before mentioned, was made out of funds received by him, Walker, under and by virtue of such assignment; that such assignment was then and there shown to the plaintiff, and either read or its contents stated to him; and that the plaintiff then signed and left with Walker a receipt, whereof a copy was set forth, and which stated the receipt, on "March 23, 1850, of F. W. Walker, assignee of Fish, Middleton & Co. \$106,60 on account of said assignment." In a counter-affidavit, sworn to 31st January, 1851, the plaintiff stated that at the time of the payment made to him by the defendant Walker, he, the plaintiff, understood the same to be paid by Walker under an assignment or power made long previous to the 16th of the same month of March.

The motion to dissolve the injunction was argued at the March special term, 1851, before Mr. Justice Edmonds, who denied the motion; giving it as his opinion that the restriction put by the debtors in the assignment, on the sale of the property, prohibiting its being sold on credit, was one which they had no right to

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impose. From this decision the defendant Walker appealed to the general term.

S. P. Nash, for the appellant.

C. Tracy, for the respondent.

By the Court, EDWARDS, J. There are two grounds on which the plaintiff in this case contends that the assignment in question is fraudulent and void ; first, that the individual property of the copartners is made liable in the first instance to the payment of the partnership debts ; and second, that the assignee is directed not to sell upon credit. The first question is settled by the decision of the chancellor in the case of *Kirby v. Schoonmaker*, (3 Barb. Ch. Rep. 46.)

If the assignment is void upon the second ground, it must be because its effect is to hinder, delay, or defraud creditors. It is well settled, that, as a general rule, it is the duty of the assignee to dispose of the assigned property at once ; and that, when it can be done consistently with the interests of the parties, it should be sold for cash. The question then arises, whether a specific direction to the assignee to do what is, *prima facie*, his duty, is, *per se*, evidence of fraud. It may be, that such a provision is an unwise one, and one that ought not to be countenanced, and when there are any circumstances which go to show that a forced sale was intended, to the injury of the creditors, it ought to be taken into consideration as an important item of evidence, which, in connection with the other circumstances, would justify this court in setting aside the assignment. But, it seems to me, that this is all the effect which should be given to such a provision.

It was also contended that the provision contained in the assignment for the return of the surplus, after the payment of the debts of the assignors, rendered the assignment void. In the cases cited in support of this proposition, *Barney v. Griffin*, (2 Comst. 363,) *Goodrich v. Downs*, (8 Hill, 38,) there was an assignment for the payment of a part of the debts of the assignor.

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In this case, the assignment is for the payment of all the assignors' debts. I think that the order made at the special term should be reversed, without costs.

MITCHELL, J. concurred.

EDMONDS, P. J. dissented.

Order reversed.

[NEW-YORK GENERAL TERM, June 14, 1851. *Edmonds, Edwards and Mitchell*, Justices.]

LYON and others, Executors, &c. vs. MARSHALL.

In an action of trespass on the case, where the defendant relies upon his discharge under the bankrupt law, and the plaintiffs attempt to avoid the discharge, on the ground of concealment, and omissions, in the petition and schedules, and irregularities in the proceedings on behalf of the bankrupt, there is no impropriety in the defendant's showing that the plaintiffs knew of all those matters, at the time that the bankrupt's proceedings were pending; and that they, in fact, raised the same objections in the course of those proceedings. Neither is there any impropriety in the defendant's showing that those objections were not considered available in opposition to the granting of the decree of bankruptcy.

Where, in such a case, the judge, in his charge to the jury, stated that the alleged omissions in the defendant's petition and schedules, in order to be sufficient to impeach the discharge, must be willful and *fraudulent*, instead of saying that they must be willful; but in a subsequent part of his charge, he laid down the rule that to avoid a discharge in bankruptcy, it must appear that the defendant has committed a fraud, or willfully concealed his property; and the exception to the charge was general, and not to any particular part: *Held*, that even if exceptions had been taken to each particular part of the charge, they could not be sustained; that the word *fraudulent*, was, evidently, not intended to mean any thing more than willful, and that taking the whole charge together, the jury must have so understood it. It is no ground of error, that the judge in his charge to the jury, stated, as law, what had nothing to do with the case.

A person applying for the benefit of the bankrupt act, may, without committing a fraud, make a reasonable compensation to counsel for the purpose of

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defraying the expenses of his discharge ; otherwise the act could be of no avail to him. And when he does part with his property for that purpose, he can not be said to conceal it, if he omits to set forth such property in his petition. He has nothing which he can conceal.

A judge is right in refusing to charge the jury in the manner, or to the purport requested by a party, where there is nothing in the case to call for such a charge.

An instrument in writing made payable "*to the estate of M. L. deceased,*" and not to any person or persons by name, is clearly not a promissory note, under the statute. Whatever it may be considered, it is not a promise to pay the testator, for he is described as deceased. It can only be recovered upon as a promise to pay some other person or persons.

If it be regarded as a promise to pay the executors of the deceased, then there is no necessity for their suing in a representative capacity ; and doing so, unnecessarily, they are, if defeated, liable to pay costs, without a special motion or order for that purpose ; and the defendant may enter up judgment against them for the costs, as of course.

THIS was a writ of error to the court of common pleas for the city and county of New-York, tested in July term, 1846, and returnable at the October term, then next. Catharine Lyon, executrix, and Epenetus C. Gray and John Wright, executors of the estate of Moses Lyon, plaintiffs, brought an action against Mathew Marshall, defendant, upon promises, for \$300. The declaration contained the usual money counts, and a count upon an *insimul computassent* ; and the usual profert of letters testamentary. The promises were alledged to have been made on the 15th *April*, 1848. The defendant pleaded his discharge as a bankrupt, by the district court of the United States for the southern district of New-York, on the 15th *September*, 1843. The plaintiffs put in a replication impeaching the accuracy of the defendant's inventory, presented by him to the district court. To this replication was attached a notice, specifying the instances in which the inventory was alledged to be inaccurate, and amongst others, the omission to mention a note of H. Inman to the defendant for \$100. The cause was tried on the 9th October, 1845, before Charles P. Daly, one of the associate judges of the said court of common pleas, and a jury. The plaintiffs read in evidence an instrument, in the following terms : "\$214,44. New-York, Sept. 15th, 1842. Four months after date, I prom-

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ise to pay the estate of Moses Lyon, deceased, or order, two hundred fourteen $\frac{1}{4}$ dollars, value received. MATHEW MARSHALL." The signature was admitted, and also, that the amount including interest, was \$254.94; whereupon the plaintiffs rested. The defendant's counsel then read in evidence a certificate of discharge in bankruptcy, in the same words as it was set out in the defendant's plea. The granting of the certificate, the seal of the court, and the signatures of the judge, and of the clerk of the United States district court, were admitted by the plaintiff. The plaintiff then proved by H. Inman, that on the 11th December, 1842, at the request of the defendant, to whom he was then indebted, he gave his promissory note for \$100, at sixty days; and that it was paid by the witness at maturity. In the schedule of the creditors of the defendant, which formed a part of the papers presented by him on his application for discharge as a bankrupt, was the following entry: "Catharine Lyons, gold-beater, of the city of New-York, for labor, \$420." No mention whatever, was made therein, of Moses Lyon, or his executors; nor was any mention made of the note from H. Inman. The defendant then proved by William W. Campbell, that he, as counsel for the defendant in his proceedings in bankruptcy, received the note of H. Inman to the defendant, towards his services as such counsel; that he obtained payment of it, and that no part of that money went back into the defendant's hands. The defendant also offered in evidence a record of judgment in the said court of common pleas, filed December 30th, 1842, between Catharine Lyon, plaintiff, and Mathew Marshall, defendant, for \$236.49; which judgment appeared to have been rendered on a note therein recited as follows: "New-York, June 1st, 1842. \$222 $\frac{2}{5}$. Six months after date, I promise to pay to the estate of Moses Lyon, deceased, or order, two hundred and twenty-two $\frac{1}{4}$ dollars, value received. (Indorsed) Epenetus C. Gray, executor of Moses Lyon, deceased." The defendant then offered in evidence certain written objections, which the plaintiffs had presented to the said district court of the United States, on the petition of the defendant, before mentioned, for his discharge as a bankrupt; the plaintiffs objected to these

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as irrelevant, but the court overruled this objection, and admitted the paper to be read in evidence; to this the plaintiff excepted. In this paper, the plaintiffs alleged that the defendant was indebted to them as executors of Moses Lyon deceased, on "two promissory notes, drawn by said Marshall, and payable to said estate or order, the sum of about four hundred and forty-five dollars;" "and they interpose the following as grounds of objection to his being declared a bankrupt: 1st. because the said estate is not mentioned as a creditor of said Mathew Marshall, either in his petition or schedules in that behalf." Five other distinct objections were set forth, alledging, in substance: that the petition and schedules were sworn to, before the petitioner's own counsel; that they did not accurately set forth a large claim due and owing to the petitioner; that they did not state and accurately set forth all the other claims and property of the petitioner; that the petitioner had made preferences in the payment of his debts: that the schedules were uncertain, untrue, &c. And the executors prayed, "that the same may be inquired of and proved according to the rules and practice of this court," &c. The defendant then offered in evidence an order, made by the district court, on the hearing of the commissioner's report of proofs taken on those objections, in which, "it being considered by the court that the objections interposed are not supported by the proof, it is ordered accordingly, that the objections be overruled and disallowed, and that the bankrupt be entitled to a decree in bankruptcy." The plaintiffs objected to the admission of this evidence, but their objection was overruled, and they excepted. The judge charged the jury, that, the discharge in bankruptcy was an effectual bar to the plaintiff's recovery, unless void by reason of fraud, and the only question, therefore, to be determined by the jury was, whether or not the defendant was guilty of fraud in obtaining it: that the omission of a specification of the note then in controversy, or the omission to mention Moses Lyon's estate as his creditor, was not sufficient to impeach the defendant's discharge, or entitle the plaintiffs to a verdict, unless accompanied by proof on the part of the plaintiffs, that such omission was fraudulent; that to avoid

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a discharge in bankruptcy, it must appear that the defendant has committed a fraud, or willfully concealed his property, contrary to the provisions of the bankrupt act; that this was a question of fact for the jury; that a party, on applying for the benefit of the bankrupt act, had a right, under that act, to set aside reasonable and necessary assets and property, for the maintenance of himself and family for a reasonable period, and also to defray his expenses in procuring his discharge; and that this defendant, therefore, had a right to apply a portion of his assets, for the purpose of obtaining such discharge, and paying his expenses incident thereto; and if such assets or property were so applied previous to filing his petition, he might omit to mention it in his petition or schedules, without subjecting himself to the imputation of fraud; that it would be for the jury to say whether the amount appropriated by the bankrupt in this case, was a reasonable amount, and necessary to enable him to obtain such discharge. To this charge the plaintiffs excepted. The plaintiffs' counsel then requested the court to charge the jury, that, at any rate, prospective counsel fees, over and above the taxable fees provided for by the rules of the district court, were not embraced in such necessary and reasonable expenses, and that if the amount reserved by the Inman note was more than the taxable fees, provided for by the rules of that court, then the defendant had not a right to omit to specify the same in his petition and schedules. The court refused so to charge, and the plaintiffs excepted. The jury, under the charge of the court, returned their verdict for the defendant, who entered up judgment, with costs, as of course, without having previously moved for costs. Upon the application of the plaintiffs, who brought a writ of error upon the judgment, a writ of *certiorari*, alleging diminution, was issued to the court below, and upon the return it appeared that the plaintiffs made motions and obtained orders in that court, in respect to taxation and retaxation of costs, on the judgment for the defendant; that on the 27th December, 1845, the court denied the plaintiffs' motion to set aside the judgment entered against them for costs; but allowed a retaxation of the defendant's costs, at the plaintiffs' expense. It also ap-

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peared that previous to May, 1842, the defendant was indebted to the estate of Moses Lyon, then deceased, in about the sum of \$400, secured by the defendant's notes, and that he was at the same time indebted to Catharine Lyon, individually, in about the sum of \$300; that to avoid the necessity of two suits, the executors indorsed said notes, so as to bring one suit in the name of Catharine Lyon, sometime in May, 1842; that suit was settled by the defendant's paying the amount due to Catharine Lyon, individually, and giving two new notes for the amount of about \$420, due to the estate, which according to her wish, or that of her attorney, were made payable to the estate of Moses Lyon, deceased, although they were given long after his death; that on one of those notes a suit was brought in the name of Catharine Lyon, and a judgment in her favor recovered 30th December, 1842, against the defendant, for \$236.49; that the defendant, on the 16th December, 1842, presented his petition to the district court of the United States for the southern district of New-York, for a discharge as a bankrupt; that the plaintiffs commenced their suit in April term, 1843, by filing a declaration pursuant to the statute; that the defendant's discharge as a bankrupt, granted 15th September, 1843, was pleaded *puis darrein continuance*, in this suit; that there had been two trials in this suit; that on the *first* trial, the plaintiff recovered a verdict, which was set aside by the court of common pleas, in term; and on the second trial, the verdict was rendered for the defendant, as above stated.

E. C. Gray, for the plaintiffs.

E. Ward, for the defendant.

By the Court, EDWARDS, J. The first exception taken by the plaintiffs, was, to the admission in evidence of the objections which were made by them, in the United States district court, to the defendant's being declared a bankrupt. It will be seen, by reference to these objections, that they related to the same matters as those which were set up in this suit, for the purpose

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of defeating the defendant's discharge. We think that there was no impropriety in the defendant's showing that the plaintiffs knew of all these matters, at the time that the bankrupt's proceedings were pending; and that they, in fact, raised the same objections in the course of those proceedings. Neither was there any impropriety in his showing that they were not considered available, in opposition to the granting of the decree of bankruptcy. The order of the court, which was made in this matter, proved nothing more than was already admitted by the pleadings; for there was no denial of the plea of a discharge in bankruptcy.

The next exception was to the judge's charge. This exception is general, and not to any particular part. But, even if exceptions had been taken to each particular part of the charge, we think that they could not be sustained. The first objection which was made upon the argument, was, that the judge stated that the alleged omissions in the defendant's petition and schedules, to be sufficient to impeach the discharge, must be willful and fraudulent, instead of saying that they must be willful. But it appears that in a subsequent part of his charge, he lays down the rule, that to avoid a discharge in bankruptcy, it must appear that the defendant has committed a fraud, or willfully concealed his property. The word *fraudulent* was, evidently, not intended to mean any thing more than willful, and taking the whole charge together, we think that the jury must have so understood it.

The next objection is, that the judge stated that a party applying for the benefit of the bankrupt act, had a right to set aside property for the maintenance of himself and family. But this is no ground of error, for it had nothing to do with the case. (*Hayden v. Palmer*, 2 Hill, 206.) The next objection taken is, that the judge charged that the defendant had a right to apply a reasonable amount of his property to the payment of the expense of proceedings to obtain his discharge; and that if such application was made previous to filing his petition, he might omit to mention such property in his petition and schedules. A person may, without committing a fraud, make a reasonable compensation to counsel for the purpose of defraying the expenses

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of his discharge; otherwise, the law could be of no avail to him. And if he does part with his property for that purpose, he can not be said to conceal it, if he omits to set forth such property in his petition. He has nothing which he can conceal. We think, too, that the judge was right in refusing to charge as requested, for there was nothing in the case to call for such a charge.

The next question arises upon the certiorari which was issued, alledging diminution. It appears that the defendant entered up judgment in the court below for his costs. This the plaintiffs contend was irregular, as they sued as executors. The instrument sued upon was made payable "to the estate of Moses Lyon deceased," and not to any person or persons by name. Such an instrument is, clearly, not a promissory note under the statute. But, whatever it may be considered, it certainly is not a promise to pay the testator, for he is described as deceased. It could only be recovered upon as a promise to pay some other person or persons. If it be regarded as a promise to pay the plaintiffs, as it was treated in this case, there was no necessity for their suing in a representative capacity; and, having done so unnecessarily, they are liable to pay costs, without a special motion or order for that purpose. (*Goldthwayte v. Petrie*, 5 T. R. 284. *Ketchum v. Ketchum*, 4 Cowen, 87. *The People v. The Judges of The Albany Mayors' Court*, 9 Wend. 486.)

The judgment below must be affirmed.

[NEW-YORK GENERAL TERM, JUNE 14, 1851. *Edmonds, Edwards and Mitchell*, Justices.]

BRINCKERHOFF vs. STARKINS.

It is a general rule that no person can acquire an exclusive right in navigable waters, except by grant from the sovereign power, or by prescription, which supposes a grant, the evidence of which has been lost.

A person who plants oysters in navigable waters, opposite to the land of another person, does not thereby acquire such a possession of them as will enable him to maintain trespass against the owner of the adjacent land for taking them away.

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It is not doubted that oysters are animals *feræ naturæ*; nor that the sea, or navigable bays and rivers, are their natural element.

The only right which a person can acquire to animals *feræ naturæ*, is a qualified property in them; that is, they are his property while they continue in his keeping, or actual possession. But if they escape, or if he permits them to go at large, his property instantly ceases, unless they have *animus revertendi*, which, it is said, is only to be known by their custom of returning. If the intention to return exists, in contemplation of law, the possession continues. But in the case of oysters no power of locomotion exists; they can not, of their own act, either escape or return. It follows then, that a man can have property in them, only when he has an actual possession.

It can not be contended that a party who has once acquired the possession and ownership of oysters, can restore them to their natural condition in navigable waters, and without asserting any other right of ownership, or establishing any other evidence of actual possession, can recover in trespass, against any person who shall, at any future time, carry them away. He should, at least, have the power of present actual possession, accompanied by a continued assertion of ownership, and by such evidence of the right of possession as will necessarily exclude the right of any other person.

THIS was an action of trespass brought by Starkins, the defendant in error, against Brinckerhoff, the plaintiff in error, in a justice's court, for taking a quantity of oysters from Le Roy Bay, Long Island Sound. The cause was tried on the 29th of May, 1847, before the justice and a jury; a verdict found of *no cause of action*; and a judgment rendered thereon against the plaintiff in the action, and a *certiorari* brought thereon to the Westchester county court, by whom the justice's judgment was reversed. Upon this judgment of reversal a writ of error was brought to the supreme court. The facts of the case are sufficiently stated in the opinion of this court.

J. Howe, for the plaintiff in error.

R. M. Tysen, for the defendant in error.

By the Court, EDWARDS, J. The return to the *certiorari* which was issued in this cause, shows that a witness, called on the part of the plaintiff below, testified that about four or five years previous to the trial, the plaintiff planted oysters in the mouth of Le Roy Bay, adjoining Long Island Sound; but the

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quantity was not stated. The witness also testified that he was an oysterman, and had known the bay for twenty years, and that there was no natural growth of oysters there to his knowledge. The trespass for which the suit was brought, was alledged to have been committed on or about the 10th day of March, 1847; and the trial took place on the 29th day of May in the same year. It was further testified, on the part of the plaintiff, that he placed buoys over the oysters the first year that they were planted, which were carried away; and that afterwards, other buoys were placed there, which were also carried away. The witness further stated, that he was near the oyster bed in 1843, and in 1844, and that he did not then see any buoys there, and had not seen any since they were put there the second time, till about the time of the trial of a previous suit, which seems to have taken place shortly before the trial of this suit. It also appeared that the oysters were planted opposite to the defendant's land; and that his servant, by his orders, carried away about fifteen bushels of them.

Upon this state of facts, a verdict and judgment were rendered for the defendant below. A writ of *certiorari* was then issued from the court of common pleas of Westchester county, and the judgment rendered by the justice was reversed. The case now comes before us upon a writ of error.

The questions which were raised by the parties, on the trial, do not very clearly appear from the error book. It was contended upon the argument, that the error which justified the reversal of the judgment of the justice before whom the cause was tried, was to be found in his charge to the jury. But even that does not, distinctly, present the questions which were discussed before us. The only legal proposition contained in the justice's charge is, that no person can acquire an exclusive right to the tide waters of Long Island Sound, by staking or buoying a piece of ground, under those waters, for planting oysters therein, without legislative enactment. This is, in substance, nothing more than the general rule which is to be found in the books, and which certainly of late years has not been doubted, that no person can acquire an exclusive right, in navigable wa-

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ters, except by grant from the sovereign power, or by prescription, which supposes a grant, the evidence of which has been lost. (*Carter v. Murcot*, 4 Burr. 2164. *Gould v. James*, 6 Cowen, 369. *Rogers v. Jones*, 1 Wend. 237. 3 Kent's Com. 418.) I shall assume, however, for the purpose of testing the validity of the claim set up by the defendant in error, that the justice charged, that upon the state of facts proved, the plaintiff was not entitled to a verdict. The jury, undoubtedly, considered this to be the effect of his charge, and I think that we are justified in so regarding it; particularly as it was thus treated by the counsel on both sides, upon the argument.

The amount in controversy in this suit is insignificant, but the principles involved in it are of the highest importance.

The defendant in error contends, that the proof offered by him established such a possession of the property taken as to entitle him to recover its value in an action of trespass. It is not doubted that oysters are animals *feræ naturæ*; nor that the sea, or navigable bays and rivers, are their natural element. It is contended, however, that in this case the oysters were reclaimed, and that the plaintiff below had acquired a qualified property in them, which had not been abandoned, or lost, by planting them in the manner and at the place stated. In the case of *Fleet v. Hegeman*, (14 Wend. 42,) which was particularly relied upon by the defendant in error, it appeared that the plaintiff had gathered a quantity of oysters when small, about two years before the trial, and had planted them in a bed in Oyster Bay, about fifteen rods from the adjoining shore, of which he was the proprietor; and that he enclosed them with stakes; that no oysters grew there at the time, and that none had grown since, outside of the bed. Upon this state of facts, the supreme court reversed the judgment of the court of common pleas, which had been given in favor of the defendant. The ground of this decision was that the oysters had been reclaimed.

The only right which a person can acquire to animals *feræ naturæ*, is a qualified property in them; that is, they are his property while they continue in his keeping, or actual possession. But if they escape, or if he permits them to go at large, his

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property instantly ceases, unless they have *animum revertendi*, which, it is said, is only to be known by their custom of returning. (2 Bl. Com. 392.) If the intention to return exists, in contemplation of law, the possession continues. In the case, however, of the animals in question, no power of locomotion exists. They can not, of their own act, either escape or return. It follows, then, that a man can have property in them only when he has an actual possession. The question then arises, whether there was such a possession in this case. It certainly will not be contended, that a party who has once acquired the possession and ownership of oysters, can restore them to their natural condition in navigable waters, and without asserting any other right of ownership, or establishing any other evidence of actual possession, can recover in trespass, against any person who shall, at any future time, carry them away. He should, at least, have the power of present actual possession, accompanied by a continued assertion of ownership, and by such evidence of the right of possession, as necessarily excludes the right of any other person. It seems to me, that it is upon this principle alone that the case above cited can be sustained. And even this is an extension of the rule laid down by the elementary writers. But, adopting the case of *Fleet v. Hegeman* as an authority binding upon us, which we think we are bound to do, still we do not think that the claim of the defendant in error can be sustained. What were the facts upon which that case was decided? In the first place, it was shown that the oysters had been planted but about two years before the trial; next the bed was distinctly defined, and enclosed by stakes; and lastly, the bed was opposite the plaintiff's land, and must be supposed to have been within his view, and capable of being watched and protected by him. In the case before us, on the contrary, there was no evidence as to the quantity of oysters which had been planted by the defendant in error; they had been planted about five years before the alledged trespass was committed; there had been no stakes, or enclosure, defining the extent of the bed. It is true, that buoys had been placed there at two different times, but they had been carried away, and from the year 1843 to a period

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shortly before the trial, in 1847, there had been neither buoys nor any other evidence of an assertion of ownership; and, in addition to all this, the oysters were in front of the land of the plaintiff in error. If, upon this state of facts, the plaintiff below was entitled to a verdict, I can not see why a person, who places oysters in any of the navigable waters of this state, does not acquire the exclusive property in them, and in all oysters which shall be found in the same place, provided he can show that there were none there before, and that he has, at some time, held out some evidence of an assertion of ownership, either to assist in guiding him to the place, or to warn others not to interfere with it. The important evidence of property arising from an enclosure by stakes, or otherwise, was wanting in this case. If such was the character of the bay, that it did not admit of such an enclosure, the conclusion must be, not that, for that reason, such evidence of ownership was unnecessary, but that it is a place where the right of property, asserted in this case, can not be established. It seems to me, that the ownership of the adjoining premises is also an important piece of evidence to establish the claim which is set up in this case; not upon the ground that an adjoining proprietor has any rights in navigable waters beyond those of the public, for it is well settled that he has not, (*ubi sup.*) but as an item of evidence tending to establish a qualified property, it is most important. In such a case, he has the property under his watch and guard, and he constantly has the power of immediate, present, actual possession. The conclusion then, to which we have arrived, is, that the plaintiff failed to make out such a case at the trial as entitled him to a verdict.

Although we consider the case of *Fleet v. Hegeman* as an authority which we are bound to follow, still, it seems to us, that the court overlooked the idea, that the principle established by them, if carried out, will, in effect, authorize an exclusive appropriation of public navigable waters for fishing purposes; for there is no limit fixed to the extent to which an individual can make his oyster beds, and so long as he has oysters there no other person can lawfully plant his in the same bed; so that the result might be the exclusive appropriation, by a few indi-

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viduals, of all the navigable waters capable of being thus appropriated. In the case of *Arnold v. Mundy*, (1 *Hulst.* 1,) which arose in a neighboring state, the court felt the full force of this difficulty, and they held an individual could not acquire an exclusive right to an oyster bed, even by a grant from the state; and that the only way in which he could acquire even a temporary enjoyment must be by a lease from the sovereign power, for a reasonable toll or rent; and that too as an exercise of the *jus regium*, for the common benefit of every individual citizen.

We are of opinion that the judgment of the court of common pleas should be reversed.

[NEW-YORK GENERAL TERM, JUNE 14, 1851. *Edmonds, Edwards and King*, Justices.

 SHERMAN vs. WAKEMAN.

What is a sufficient promise to take a case out of the statute of limitations; And what is sufficient evidence to support such a promise.

Where a note has been barred by the statute of limitations, in order to sustain an action to recover the amount thereof, there must be proof of an unqualified promise to pay the entire debt, in express terms, or by fair and just implication from an explicit admission of it as an existing debt, for which the debtor acknowledges himself liable, and which he is willing, and intends to pay.

If the promise be conditional, to pay when able, present ability must be shown. To support an action upon a note barred by the statute, one of the plaintiff's witnesses testified that the defendant told the plaintiff he would give him two notes, one at six, and the other at twelve months; that he wanted the plaintiff to feel at liberty to call at any time; that he could come in at any time, and expect something on account. The other witness testified that the defendant said this was a debt which he intended paying, and would pay. That he felt in honor bound to pay this debt, and would pay it. That he felt under obligations to pay the plaintiff on account of services which he had rendered him. In addition to this, there was proof that the defendant was able to pay the debt claimed by the plaintiff. *Held*, that the evidence was not of that equivocal, vague and indeterminate character, that ought not to go to the jury as evidence of a new promise; and that a motion for a nonsuit, upon the evidence, was properly denied.

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The rule which was laid down in the case of *Bell v. Morrison*, (1 *Peters' Rep. Sup. Ct. U. S.* 351,) and which was adopted in the case of *Purdy v. Austin*, (8 *Wend.* 187,) and which has since been followed in this state, is, that in order to prevent a statutory bar, there must be an admission of a previous subsisting debt, which the party is liable and willing to pay. (a)

If the charge of the judge contains, *substantially*, the propositions, which the counsel for one of the parties had requested the judge to present in his charge, it is a sufficient compliance with such request, and it is no ground of error, that they are not expressed in precisely the same terms.

THIS case came up on a writ of error to the superior court of the city of New-York, returnable at the May term, 1847, of this court.

The declaration, filed in the court below on the 15th of February, 1845, was in *assumpsit*, upon two promissory notes of the defendant, payable to the plaintiff or order, one for \$628,81, payable in twelve months after date; and the other, for the same sum, payable two years after date; and both were dated 11th December, 1834; whereon a new promise to pay as soon as he should be able to do so, was alledged to have been made on the first day of February, 1845, by the defendant. The declaration contained an averment that from the day of the making the new promise, until the commencement of the suit, the defendant had been able to pay, &c. The declaration also contained the usual money counts, alledging the indebtedness, and promises thereon, as of the first of February, 1845. The de-

(a) By "AN ACT to simplify and abridge the practice, pleadings and proceedings of the courts of this state," passed April 12, 1848, (*Laws of 71st Sess. chap. 379*), designated as the "Code of Procedure," (*chap. 380*), the rule in the case of a statutory bar has been materially changed. The section of the statute is as follows: "§ 90. Where the time for commencing an action arising on contract shall have expired, the cause of action shall not be deemed revived by an acknowledgment or new promise, unless the same be in writing, subscribed by the party to be charged thereby." This act was amended at the next session, (*chap. 348*), and again amended at the 74th session; and by §110, which is alike in both the amendatory acts, it is declared, that "No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this title, unless the same be contained in some writing, signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest."

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defendant pleaded, 1st. The general issue ; 2d. The statute of limitations ; 3d. His discharge as an insolvent debtor, under the two-thirds act, by the recorder of the city of New-York, on the 23d August, 1841 ; and that the plaintiff in this cause was one of the petitioning creditors. The plaintiff replied, joining issue on the first plea ; to the second plea, alledging that the causes of action, and each and every of them, did accrue within six years next before the commencement of the suit, and tendering an issue to the country. To the third plea, denying the same, and tendering an issue thereon to the country. The plaintiff also, by leave of the court, replied further, denying that the recorder granted the defendant's discharge, and tendering an issue thereon to the country ; and also, by like leave, that the defendant after his supposed discharge, and before the commencement of the suit, to wit, on the first February, 1845, at &c., "assented to, and then and there ratified, renewed, confirmed and made the several promises and undertakings in the said plaintiff's declaration mentioned ;" concluding with a verification and prayer for judgment. The defendant rejoined, joining the issues tendered by the plaintiff ; denying the last replication, and tendering an issue to the country thereon.

The cause was brought to trial in the superior court, at the April term, 1846, before JONES, chief justice. The plaintiff proved by a witness (George E. Schenck,) that on the 18th January, 1845, he presented the notes declared on, to the defendant, at his own office, who admitted the signature thereto to be his ; and, in answer to the plaintiff's request for a payment of part of the amount due, said : "I can not now, but keep the memorandum, call again, you can feel at liberty to call at any time, and come in at any time, and you may expect something on account ;" and that he also said, "I will give you two notes, one at six months and one at twelve months." It was also proved by another witness, (H. F. Tallmadge,) that he called on the defendant, in January, 1842, on his own account, and asked for payment of some part of the defendant's indebtedness to him ; and that the defendant said, that these debts due to the plaintiff, and to the witness, he intended paying and would pay. That he

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wanted one year more of successful business to begin to pay the plaintiff and the witness. He gave the witness a note for \$75, which he sent to him enclosed. The witness did not address the defendant in behalf of the plaintiff; and the defendant did not authorize the witness to make any statement of this conversation to the plaintiff; but the witness thought he did communicate this conversation to the plaintiff, but could not tell when he mentioned it to him. In order to show the defendant's ability to pay, the plaintiff's counsel offered in evidence certain transcripts from the register's office of the city of New-York, of sundry conveyances of real estate to the defendant, properly certified as transcripts. The defendant's counsel objected, but the objection was overruled, and the counsel excepted. The plaintiff having rested, the defendant's counsel moved for a nonsuit, on the ground that there was not sufficient evidence to support the allegation of a new promise to pay the plaintiff's alledged demand within six years before the commencement of this suit. And that if there was any evidence of a new promise, it was not of a new promise to pay the whole of the alledged original demand, but only to pay some part thereof, and therefore that such evidence varied from and did not support the promises alledged in the special counts of the declaration, and that the evidence did not establish against the defendant either an admission of present indebtedness or a willingness to pay the alledged demand, within six years next before the commencement of this suit; and that at most the evidence showed an offer by the defendant, to discharge a supposed moral duty, and that the plaintiff declined to accept such offer; which unaccepted offer did not bind the defendant, and did not entitle the plaintiff to recover. The judge overruled the motion for a nonsuit, and the defendant excepted. The defendant's counsel then called as a witness, Robert B. Folger, who testified, that he was in the store of the defendant, Sherman, in January, 1845, when the plaintiff, Wakeman, and the witness, Schenck, were there; no other persons were present except himself and the defendant. Wakeman commenced the conversation with Sherman before Schenck came in, and continued it after he went out. Schenck

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conversed with no one but the witness whilst he was in the store. Whilst Schenck was conversing with him, witness heard some part of the conversation between Wakeman and Sherman. The conversation was continued after Schenck went out, and then witness heard all that passed. Both Wakeman and Sherman appeared to be excited; Sherman remarked that he did not consider himself indebted to Wakeman, a single dollar; that he was not under any pecuniary obligations to him whatever, and intimated that his discharge under the two-third act relieved him from any pecuniary liability. But he stated further, that he felt himself under a moral obligation to Wakeman, and that moral obligation he meant to discharge. That he would give him two notes, and showed a memorandum on a piece of paper, the amount the witness knew nothing about. He, Sherman, stated that he wished to give him, Wakeman, those notes, saying at the same time, that was not all he intended to give him. That these notes were so drawn in order that he could pay them without feeling them. That he intended to give others of the same kind, in future, until the amount was paid. That he did not wish him, Wakeman, to feel that it was all he intended to do for him, but wished him to call whenever he thought proper. Wakeman replied, that he did not want any notes; he wanted the money. The proposed arrangement was then altered, Sherman offering to pay him some money, and shorten the time of the notes. Wakeman refused, on the ground that he was not willing to give up the old notes in his possession until the whole amount was paid. Something was said about giving up the old notes; the reply Wakeman made, was, that he would not give up the notes in his possession for the notes Sherman offered. The whole negotiation was then brought to a close, Wakeman saying, that he must pursue other means of getting the amount that Sherman owed him. There was some further conversation; Wakeman said, that he had three witnesses to prove a promise to pay; he named one or two persons who would prove a promise to pay; and said that one of them had taken down a memorandum of a specific promise to pay. Wakeman was very much excited when he made these statements. Sherman replied that

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he did not owe him a dollar. On his cross-examination, the witness further stated, that when Wakeman said that he could prove that Sherman had made specific promises to pay him, Sherman denied that he had made any promise to pay. Wakeman asserted that he had, and that he could prove it by three witnesses. Some angry remarks then passed on both sides, and the interview closed. The defendant's discharge was then proved, and read in evidence. After the counsel on both sides had summed up, the defendant's counsel requested the judge to charge the jury ; 1. That more than six years having elapsed since the maturity of the notes and before the commencement of the suit, the defendant was not liable, unless the plaintiff had proved an express and absolute promise to pay by the defendant. 2. That an offer to pay something, and which was not accepted, was not such a promise as would entitle the plaintiff to recover. 3. That the defendant having been discharged under the two-third act, was not liable, except upon an absolute and express promise to pay, made after obtaining his discharge. 4. That after such discharge a mere acknowledgment of the debt, and an offer to pay something, was not such a promise as would entitle the plaintiff to recover. 5. That after a discharge under the two-third act, no promise is binding or valid unless in writing. 6. That the promise proved was not the promise declared on, the promise declared on being a promise to pay the whole debt when able, the promise alledged to be proved, being a promise to pay something. The chief justice charged the jury, that the material questions were, whether any subsequent promise, either absolute or conditional, had been shown, and whether, if conditional, the conditions had been so fulfilled or satisfied as to render the engagement absolute. That a promise, to have the effect of reviving a debt barred by the statute of limitations, or an insolvent discharge, must be clearly proved, and must be a promise to pay the whole debt ; and, if it be conditional, to pay when able, present ability must be shown. That the recognition or acknowledgment of the debt as a subsisting debt, without an avowal of present liability and willingness to pay it, would not suffice, but that an explicit admission of it as a subsisting debt, and ex-

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pressions of liability and willingness, and intention to pay it, importing or clearly implying an agreement to pay, would be sufficient, unless accompanied at the time by a claim of his discharge and a denial of the obligation to pay, or by circumstances repelling the presumption of an intention and agreement to pay the debt. That if the jury, applying these principles to the facts of the case, should be of opinion, upon the evidence, that the defendant within six years, and subsequently to his discharge, had made an unqualified promise to pay the entire debt, in express terms, or by fair and just implication from an explicit admission of it as a subsisting debt for which he acknowledged himself to be liable, and was willing and intended to pay, the plaintiff would be entitled to their verdict, unless they should find that the defendant at the time insisted upon the discharge, and denied his obligation to pay the debt, or his admission, or implied agreement was accompanied by circumstances repelling the presumption of an intent and promise to pay the debt. That if the jury should find that the promise proved by Tallmadge was a promise to pay Wakeman the debt of the defendant to him, and that it had been communicated to Wakeman, the plaintiff, and that it was the defendant's intention that it should be so communicated, it was available to the plaintiff. That it was not necessary to its validity that the promise should be in writing, but that if it was conditional to pay when able, the jury must be satisfied by the evidence, of the ability of the defendant, at the commencement of the suit, to pay the debt. That the matters in evidence tending to show the ability of the defendant to pay the debt, were before the jury, and that no evidence had been offered by the defendant to rebut or repel the proof, and that it was for the jury to say whether they were sufficient, under the circumstances of the case, to satisfy them of the fact of his ability at the commencement of the suit, to pay the debt. And the chief justice refused further to charge the jury. To each of the points of the charge, and also for refusing to charge as requested, the defendant's counsel excepted. The jury found a verdict for the plaintiff for \$2118,46 damages. The exceptions were overruled, and the motion made by the defendant for

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a new trial, was denied. To this decision the counsel for the defendant excepted.

C. W. Sandford and *C. O'Connor*, for the plaintiff in error.

H. G. DeForest and *D. Lord*, for the defendant in error.

By the Court, EDWARDS, J. The defenses which were set up in this case, were the statute of limitations, and an insolvent discharge. After the plaintiff below had closed his testimony, the defendant moved for a nonsuit. At this stage of the trial, it did not appear that there had been a discharge under the insolvent laws, and the only question was, whether there was sufficient to go to the jury upon the first plea. The rule which was laid down in *Bell v. Morrison*, (1 *Peters*, 351,) and which was adopted in the case of *Purdy v. Austin*, (3 *Wend.* 187,) and which has since been followed in this case is, that, in order to prevent a statutory bar, there must be an admission of a previous subsisting debt, which the party is liable and willing to pay. The first question which arises is, whether there was sufficient testimony, under this rule, to authorize the judge who tried this cause, in refusing a nonsuit? One of the witnesses introduced on the part of the plaintiff below, amongst other things, testified, in substance, that the defendant told the plaintiff that he would give him two notes, one at six months, and one at twelve months. That he wanted the plaintiff to feel at liberty to call at any time—that he could call at any time, and expect something from him. The other witness testified that this was a debt which he intended paying, and would pay. That he felt in honor bound to pay this debt, and would pay it. That he felt under obligations to pay the plaintiff, on account of services which he had rendered him. In addition to this there was proof that the defendant was able to pay the debt claimed by the plaintiff. This portion of the testimony was somewhat, though, as we think, not materially qualified, by other portions which have not been stated. But taking the whole together, we do not consider it, to use the language of the decisions above cited, of that equivocal, vague, and indeterminate character, leading to no certain

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conclusion, that ought not to go to the jury as evidence of a new promise. On the contrary, we think that the judge was right in denying a nonsuit.

The next questions which arise are, whether the judge charged the jury as requested by the defendant's counsel, and whether, if he did so, he was justified in so doing. The first request was, that he would charge that the defendant was not liable, unless the plaintiff had proved an express and absolute promise to pay the defendant. The judge charged that a promise, to have the effect of reviving a debt barred by the statute of limitations, or an insolvent's discharge, must be clearly proved, and must be a promise to pay the whole debt. This, we think, went as far as the request of the counsel, and as far as the law warrants. The next request was, that the judge would charge, that an offer to pay something, which is not accepted, is not such a promise as will entitle the plaintiff to recover. This proposition was substantially contained in the judge's charge, for he instructed the jury, that there must be a promise to pay the whole debt. The next request was the same as the first, with the addition, that the promise should be made after the discharge under the insolvent laws. This, we think, was also contained in the judge's charge, for he stated that if the jury should be of opinion, upon the evidence, that the defendant, subsequently to his discharge, had made an unqualified promise to pay the entire debt, &c., the plaintiff would be entitled to a verdict. The next request was, that the judge would charge the jury, that a mere acknowledgment of the debt, and an offer to pay something, was not such a promise as would entitle the plaintiff to recover. Upon this point the judge charged that there must be an unqualified promise to pay the entire debt, in express terms, or by fair and just implication from an explicit admission of it as a subsisting debt, for which he acknowledged himself liable, and was willing and intended to pay. We think that the judge's charge, in this respect, was a sufficient compliance with the request of the counsel. The last request was, that the judge would charge, that the promise proved was not the promise declared upon, the promise declared upon being to pay the whole debt, and the promise alledged to

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be proved, being a promise to pay something. Upon this subject, the judge charged that the promise must be to pay the whole debt, which necessarily excluded the idea that a promise to pay something would be sufficient to sustain the declaration. As these are all the grounds insisted upon on the argument which properly arose upon the error book, we think that the judgment of the court below should be affirmed.

Judgment affirmed.

[NEW-YORK GENERAL TERM, June 14, 1851. *Edmonds, Edwards and Mitchell*, Justices.]

DRAPER & DEVLIN vs. JONES, sheriff, &c.

Where the memorandum of a contract of sale of merchandise, which was signed by a broker as the agent of the parties, contained a provision that the notes to be given by the purchasers should *be made satisfactory to the sellers*; *HELD* that the obvious construction of the contract was, that the delivery of the merchandise and the giving of the notes were to be simultaneous acts, and each was to be the condition of the other.

Such a contract differs from ordinary contracts where the sale is for cash or notes; a further act being necessary on the part of the vendors, before the vendees will have it in their power to fulfill the contract; viz. the notes to be given are to be satisfactory to the vendors. This provision will render a sale clearly and unequivocally conditional.

Upon a sale of merchandise, on a credit of four months, upon notes to be made satisfactory to the sellers, a clerk of the vendors delivered the merchandise, at the time agreed upon, to the cartman of the vendees, and another clerk shortly after the delivery called on the vendees with the bill of parcels, which contained the words, "at four months, for satisfactory security;" the vendees asked him what kind of notes would be satisfactory, and he replied, "just what the bill calls for." He again called upon the vendees, and they then said they had not fixed upon the paper that they would give; but they proposed the note of a third person for the vendors' consideration, who said they would inquire about him. But before the clerk had time to inquire again, the vendees had stopped payment, and no note was ever given. The sheriff having levied upon and taken the merchandise by virtue of an execution against the purchasers, the vendors brought an action of replevin against him for the taking. *Held*, that there was evidence enough to go to the jury, upon the question whether the sale and delivery of the property

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was conditional; and that the judge before whom the cause was tried *erred*, in ordering a nonsuit.

The title of the vendors is not divested by the receipt of the goods by the vendees, where it is apparent that such was not the intention of the parties. Where upon a conditional sale of property, the property is delivered to the purchaser, without a compliance with the condition being insisted on, at the time, yet if it is insisted upon immediately afterwards, when a bill of sale is rendered, and the vendees fully recognize and acknowledge the condition as still subsisting and binding upon them, this is sufficient to uphold the condition.

THIS was an action of replevin, brought in the superior court of the city of New-York, by the plaintiffs against the defendant, who was sheriff of the city and county of New-York, for the taking and detaining twenty barrels of Zante currants. The defendant pleaded *non cepit*; and the issue thus joined was brought to trial in the month of October, 1847, before OAKLEY, chief justice, and a jury. The plaintiffs proved by John E. Forbes, a produce-broker, that as such broker he sold, for them, a part of a cargo of Zante currants; they were sold on the 5th of November, 1846, before their arrival, which was about the 25th of the same month. The firm of Wm. Moore & Co. bought 20 barrels of them. The witness produced a writing containing the terms and conditions of the sale; it was the memorandum of the agreement he made at the time. This was the only paper signed between the parties. The writing was then offered in evidence, but objected to by the defendant's counsel: the court allowed it to be read in evidence, and the defendant's counsel excepted. It was as follows:

"New-York, 5th Nov. 1846.

Sold for account of Messrs. Draper & Devlin, 800 barrels of new crop Zante currants, of merchantable quality, to arrive from Zante per bark Columbia, at 11 cents per pound—4 months for all delivered previous to 2d December next. All delivered on or after that day, 10½ cents—four months. Notes to be made satisfactory to the sellers. If warehoused, buyers to pay the expense, not exceeding one-eighth of one per cent per pound. Optional with buyers to receive the whole, or any part, or none, of their purchases on arrival; but must receive them immediately after

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2d December, proximo, viz." Here followed the names of some twenty purchasers of different lots or parcels, of from 10 to 100 barrels respectively; and amongst them was this entry: "To William Moore & Co. 20 bbls. on terms above." On his cross-examination this witness said, "I had nothing to do with the delivery of the currants."

Samuel Drake, a witness for the plaintiffs, testified that he was a clerk for the plaintiffs, and that he delivered 20 barrels of currants to Wm. Moore & Co.; he had orders from the plaintiffs to deliver 20 barrels; the terms and price he was not aware of; they were delivered from the 3d to 5th December; he delivered to their cartman. He saw Moore, but had no conversation with him. Robert Munson, another of the plaintiffs' witnesses, testified that he was a clerk of the plaintiffs at the time of the sale, and knew of the sale and delivery of these currants. He left a bill with Moore & Co. for them, between the 5th and 7th of December; called on them same day the bill was rendered; they asked what kind of note would be satisfactory. Witness replied, a satisfactory piece of paper, just what the bill calls for. Witness called upon them again; they said they had not yet fixed on what piece of paper they would give; they said they had a running account against a Mr. John Cook, who kept a grocery store on the corner of Eighth-street and Broadway, and that when the account reached \$300 or \$400, they were in the habit of taking his note for the amount due. They wanted witness to propose Cook's note for the plaintiffs' consideration; he did so. The plaintiffs did not know about Cook, and said they would inquire about him; before witness had time to call again, the firm of Wm. Moore & Co. stopped; the plaintiffs never got any note from them. Under the bill which the witness left with them, was written, "*at four months*, for satisfactory security." Thomas F. Beers, another witness for the plaintiff, testified that he was a deputy sheriff of the defendant Jones; that the goods of Moore & Co. were levied on under the execution then produced in court, and that he, the witness, took possession of the goods after the levy. They were replevied out of his possession under the writ in this cause. The execution under which

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the levy was made was then read in evidence ; it was a writ of *fi. fa.* issued out of the supreme court, tested the third Monday of October, 1846, returnable in sixty days from the receipt thereof by the sheriff ; commanding the sheriff of the city and county of New-York, of the goods and chattels of William Moore and Samuel Bowman, to cause to be made \$28,000 of debt, and \$24,50 for damages which William H. Howland and Nathan Caswell, plaintiffs, had sustained, &c. Indorsed was, amongst other things, a direction to "collect \$14,024,50," and the receipt of the execution "Dec. 12, 1846, at half past four p. m." Signed "Wm. Jones, sheriff." With a receipt for \$1268,18 made on the execution. William Moore, another witness for the plaintiffs, testified that he was one of the firm of Wm. Moore & Co. ; himself and Samuel Bowman constituted the firm. They bought of the plaintiffs 20 barrels of currants. He knew nothing about the conditions of the sale except what the bill said. He thought no note was ever given in payment of the bill. The witness further testified that there was a large indebtedness existing by the firm of which he was a member, to the firm of Howland & Caswell, of which Nathan Caswell, the son-in-law of Bowman, was one of the partners ; Caswell was in the habit of coming to the store of Moore & Co. ; Caswell and Bowman often talked together ; witness thought he had heard Caswell make a remark like this, that the stock was not as full as it ought to be. That was not his exact words, but to the purport ; had frequently heard him say, Go out and fill up your stock ; that was the substance of the conversation. Witness had no intimation before the 12th Dec. 1846, that Caswell was going to enter up judgment upon the bond and warrant of attorney. These goods were purchased by Bowman. On his cross-examination the witness said he seldom bought goods. He did not buy any after he signed the warrant. He was aware of the purchase of these goods, after the bill came in ; they were bought against his desires and wishes ; he so expressed himself to the plaintiffs. He knew there were currants bought from Draper & Devlin, for he saw them in the store, and saw the bill. The plaintiffs then read in evidence a judgment record, and a warrant of attorney, bear-

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ing date 14th August, 1846, authorizing any attorney to appear for William Moore and Samuel Bowman, in any court, and receive a declaration on a bond bearing even date therewith, in the penal sum of \$28,000, conditioned for the payment of \$14,000 on demand, with interest until paid, at the suit of Wm. H. Howland and Nathan Caswell, and to confess the action. The warrant contained also a consent that an execution issue upon the judgment to be confessed, immediately, without any delay, and waiving any right to the thirty days' stay of execution allowed by law. A cognovit was filed as of October term, 1846, for the said Moore and Bowman, in the suit brought upon the bond and warrant of attorney. The judgment was docketed against them, as of October term, 1846, in favor of Wm. H. Howland and Nathan Caswell, for \$28,000 of debt, and \$24,50 damages. The plaintiffs rested their case, and the judge nonsuited them; to which they excepted. Their counsel insisted that there was evidence enough to go to the jury, tending to show that the sale and delivery of the said goods were conditional, and that the purchase and obtaining possession of them by Wm. Moore & Co. was fraudulent. But the judge decided that there was not evidence enough to go to the jury upon both or either of said points, and refused to permit the cause to be submitted to the jury. To this the plaintiffs excepted. The cause was brought to this court, on a writ of error to the superior court.

O. W. Sturtevant, and *L. R. Marsh*, for the plaintiffs in error, presented the following points. I. There was evidence enough to go to the jury upon, on the question of conditional sale and delivery. *It was a question for the jury—a question of fact.* (8 *Wend.* 247. 23 *Id.* 372. 22 *Id.* 659. 2 *Paige*, 169. 1 *Denio*, 571.) II. There was evidence enough to be submitted to the jury upon the question whether these goods were purchased by Bowman fraudulently, and with the intent not to pay for them. (1 *Hill*, 302. 6 *Id.* 43. 2 *Paige*, 169.) III. A nonsuit proceeds upon the ground that there is *no* evidence for the jury. If there is *any* evidence, the question of its *sufficiency* belongs to the jury. Whether there is *any*

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evidence, is a question for the judge. (1 *Phil. Ev.* 18. *Doug.* 375. *Cow. & Hill's Notes*, part I. p. 58, note 54. 6 *Hill*, 208. *Downer v. Thompson*, opinion of *Hopkins*, senator, p. 212.) IV. The purchase was by an insolvent firm, and this was evidence for the jury on a question of *intent to pay* for them. V. The sheriff stands in the same place with the purchaser, and with no more rights—having taken the goods on an execution against the fraudulent purchaser. (1 *Hill*, 302.)

N. B. Blunt, for the defendant in error. I. There are no exceptions to prejudice the plaintiffs. II. The nonsuit was properly granted. (1.) If replevin was maintainable at all, it should have been in the detinet and not in the cepit. (2.) The delivery to Moore & Co. was absolute, and the legal title in the goods was in them at the time of the sheriff's levy. (8 *Wend.* 247.) (3.) The execution alone protected the sheriff. (4.) At all events the plaintiffs had no right to the goods until they demanded a return. (5.) There was no proof of fraud in the purchase—the proof attempted was inadmissible. (*Conyers v. Enniss*, 2 *Mason*, 236.) III. The judgment below should be affirmed. A verdict for the plaintiffs, upon the testimony, would have been set aside as against the weight of evidence, or as contrary to evidence. (*Rudd v. Davis*, 3 *Hill*, 287.)

By the Court, EDWARDS, J. The memorandum of the contract of sale which was signed by the broker, as the agent of the parties, contains a provision that the notes to be given, shall be made satisfactory to the sellers. We think that the obvious construction of this contract, is, that the delivering of the merchandise and the giving of the notes were to be simultaneous acts, and each was to be the condition of the other.

But this contract differs from ordinary contracts, where the sale is for cash or notes, for a further act was necessary on the part of the vendors before the vendees would have it in their power to fulfill the contract—the notes to be given were to be satisfactory to the vendors. This provision rendered the sale clearly and unequivocally conditional. The question then arises,

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whether there was an absolute delivery of the property to the vendee, without insisting upon the condition precedent; or, in other words, whether there was a waiver of the condition.

It appears from the contract which was entered into between the parties, that the property in question, which consisted of twenty barrels of currants, was to arrive from Zante, and was to be delivered in about a month after the contract was made. It also appears by the testimony of one of the clerks of the plaintiffs, that he delivered the currants at the time agreed upon, to the cartman of the vendees, pursuant to orders which he had received from his employers; and he further states that he was not aware of the terms of the sale. If the transaction had stopped here, it might be inferred that there was an absolute delivery, and a waiver of the condition of the contract. But another clerk of the plaintiffs testifies that shortly after the delivery, he called on the vendees with the bill of parcels, and that such bill contained the words, "*at four months, for satisfactory security.*" He further states, that in his conversation with the vendees at the time when the bill was rendered, they asked what kind of notes would be satisfactory, and that he replied, "just what the bill calls for." It would seem, then, that the vendors had not intended to make an absolute and unconditional delivery of the property, and that the vendees did not suppose that they had done so. The witness further testifies that he again called upon the vendees, and that they then said, that they had not fixed upon the paper that they would give; but they proposed the note of a person with whom they had a running account, for the vendors' consideration, and they said that they would inquire about him. The witness further says, that before he had time to call again the vendees had stopped payment, and no note was ever given. It seems to me, that the fair inference from this testimony, is, not only that the sale of the property was conditional, but that, although the condition was not insisted upon at the time of the delivery, it was insisted upon immediately afterwards, when the bill was rendered, and that the vendees fully recognized and acknowledged the condition as still subsisting and binding upon them.

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We are aware that the tendency of opinion at present, is, to regard a delivery as absolute when no condition is insisted upon, and admitted at the time of delivery, although such may not have been the intention of the vendor. But if there is a clear admission afterwards that the delivery was conditional, we think that both commercial policy, and the common principles of justice, require that the condition should be upheld. It will be remembered, that in this case the vendees throughout acknowledged the condition, and that they submitted the name of a person whose note they proposed to give in performance of the condition; and that while they were in negotiation, a judgment creditor came in and caused the property to be taken under an execution in his favor. In the case of *Whitwell v. Vincent*, (4 Pick. 449,) the court say, that a delivery is conditional, if enough appear to show that such was the understanding of the parties. In the case of *Keeler v. Field*, (1 Paige, 312,) where there was a condition similar in many respects to the one in this case, it was held that the title of the vendor was not divested by the receipt of the goods by the vendee—it being apparent that such was not the intention of the parties. (See also, *Leven v. Smith*, 1 Denio, 571.) In the case before us, it will be observed, that the parties claiming that there was an absolute and unconditional delivery, are not the vendees; and it does not appear that the vendees ever set up any claim inconsistent with a conditional delivery. We think that there was evidence enough to go to the jury, upon the question, whether the sale and delivery of the property in question, was conditional; and that the judge before whom the cause was tried, erred, in ordering a nonsuit.

The judgment of the court below must be reversed, and a *venire de novo* awarded.

[NEW-YORK GENERAL TERM, JUNE 14, 1851. *Edwards, Edmonds and Mitchell*, Justices.]

STUART vs. KISSAM and others.

Although a woman be married, and have a separate estate, and a trustee, yet when the trustee puts before her eyes, clear and express notices of his doings, the same inferences must be drawn as to her reading and understanding the notice, as would arise in the case of an unmarried woman, or a man.

Although good faith must be strictly enforced against a trustee, and he may not be allowed to deal with the trust property to his own benefit, yet where the trustee had substituted a new security, by way of mortgage, in the place of a former mortgage, upon certain property, but not including the whole, which was covered by the former mortgage; and there was no gain intended to be made by the trustee; and so far as appeared, the new security would have been deemed sufficient at that time, and it was accepted by the *cestui que trust*, who was competent to judge of its value, the transaction was not deemed to be void.

Whether a different rule would apply, if it had been shown that there was a fraudulent combination between the trustee and the other parties to the transaction to cancel the first mortgage for their benefit, it is not necessary to inquire, where there is no *proof* of actual fraud; and it ought not to be gratuitously inferred.

Actions may be brought against legatees by a creditor; but he must show that no assets were delivered by the executor to the next of kin, or that the value of such assets has been recovered by some other creditor; or that they are not sufficient to satisfy his demand.

Heirs also may be made liable for the debt of their ancestor, but not unless it appears that the personal assets were not sufficient to pay the same, or that after due proceedings before the surrogate and at law, the creditor has been unable to collect such debt from the executor, or from the next of kin, or legatees. Thus a suit at law, against the prior parties, is an essential preliminary to a right to sue the heirs. The heirs are to be sued jointly in equity.

Devisees may also be liable for the debts of the devisor, but not unless it appears that the personal assets, and the real estate descended, were insufficient to discharge the debt; or that after due proceedings before the surrogate, and at law, the creditor has been unable to recover the debt.

It makes no difference, that the same persons are entitled to the whole estate real and personal. The statute makes no exception; but requires the creditor, in *all cases* to seek satisfaction from the personal property, before he resorts to the real estate in the hands of the heir.

In a suit of this kind, whether at law, or in equity, all the heirs must be joined; and the heirs and personal representatives *cannot be joined* in a suit. A trustee of the separate estate of a married woman, having become seized, in his own right, of the greater part of the premises covered by a mortgage for \$20,000, belonging to his *cestui que trust*, acknowledged satisfaction of

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such mortgage, and caused it to be canceled of record; and soon afterwards, conveyed to his brother one-third of the mortgaged premises, and took back from him, his bond for \$20,000, with a mortgage upon the part of the premises so conveyed to him, payable at the time of payment of the original bond and mortgage which he had canceled. This new mortgage the trustee substituted in lieu of the canceled mortgage, and executed a declaration of trust, declaring that he held the same in trust for the separate use of his *cestui que trust*; but the property covered by the substituted mortgage, turned out to be an inadequate security for the \$20,000. On a bill filed by the *cestui que trust*, alleging that the original bond and mortgage had never been paid or satisfied, that the cancelment of that mortgage by her trustee, was without her knowledge or assent, and insisting that it was a breach of trust; a decree was made by a judge at a special term, establishing the original bond and mortgage as valid and existing securities, saving the rights of subsequent *bona fide* mortgagees; and directing a sale of the mortgaged premises, and the payment of the deficiency, if any, out of the estate of the obligor in the original bond. Upon an appeal from this decree, it was held, that the satisfaction of the *first mortgage*, which was produced in evidence, was *prima facie* proof of its discharge; and that the whole case of the complainant depended on her establishing that the second mortgage was not substituted with her assent; and that this she had failed satisfactorily to do; and that, in this view of the case, so much of the decree appealed from, as directed a sale of any but the forty-two lots, (which were the part of the original premises covered by the new or second mortgage, which was substituted for the first,) and an account of the estate of the trustee, and of the personal assets which came to the hands of any of the parties to this suit, as legatees and next of kin, and of the real estate which came to said parties as devisees—with the other parts of the decree connected with these inquiries should be *reversed*, with the costs of appeal.

IN EQUITY. This was an appeal by the defendants from a decree made by Justice Hurlburt, at a special term held in the city of New-York, 18th March, 1848. The case at special term is reported in 2d Barbour's Supreme Court Reports, 493. After the decree was made, Robert Stuart died, and that fact having been suggested to the court, and the written consent of the solicitors for the defendants being filed, it was ordered that the suit proceed in the name and in favor of Mary R. Stuart, as sole plaintiff therein. All the important facts and circumstances of the case appear in the opinion of the court.

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E. Sandford, for the appellants.

C. O'Connor, for the respondent.

By the Court, MITCHELL, J. There are two questions raised by the appellants, which are of such consequence as to make the consideration of the others comparatively unimportant, viz. : 1st. Was not the second bond and mortgage substituted for the first, with the assent of Mrs. Stuart? and 2d. Can the legatees and devisees of Dr. Kissam, the obligor in the first bond, be made personally liable for any deficiency in the mortgaged premises on a foreclosure suit, and before resort has been had to his executors?

On the 29th of April, 1833, Mr. Cotton conveyed No. 3 of Turtle Bay Farm to Dr. Daniel W. Kissam, jr., for \$24,000, and on the same day the doctor gave to Mr. Cotton his bond and a mortgage on the same premises for \$20,000, payable with interest, on or before the 1st of May, 1843.

On the 3d of May, 1833, Mr. Cotton, with the assent of Mrs. Stuart, assigned the bond and mortgage to Joseph Kissam; on the same day, Joseph Kissam executed a deed poll, witnessed by Isaac A. Johnson, Esq., in which it is declared, substantially, that the assignment is for her sole use and benefit.

Dr. Kissam made his will, dated the 1st of December, 1834, and a codicil, dated 3d March, 1835, and died shortly afterwards. Letters testamentary were granted to his executors, Samuel Kissam and Timothy T. Kissam, on the 15th of May, 1835. The will gave the executors a power to sell the real estate of the testator, and after sundry legacies gave his residuary estate to his three brothers, Joseph, Samuel and Timothy T., and to his two sisters, Mrs. Conklin, and Maria Kissam. He left a personal estate amounting to more than \$50,000, as appeared by the inventory filed by his executors, and the bill alleges that his real and personal estate amounted to more than \$30,000 over *all* his debts and liabilities; and that the executors had not caused a final settlement of their accounts to be made before the surrogate. A witness for the plaintiff, (J.

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J. Diossy,) testified that the doctor was reputed to be worth \$80,000 or \$100,000.

The bill alledges, and the answers of Joseph, Samuel, and Timothy T. Kissam, admit that Joseph and Samuel were jointly interested with the doctor in the purchase. A bill was filed by some of the creditors of Robert Stuart, the husband of Mary R. Stuart, to set aside the conveyance to Dr. Kissam, as being fraudulent as against Mr. Stuart's creditors. The doctor, in his answer to that bill, states, that the mortgage was held for the benefit of Mrs. Stuart.

In November, 1835, the farm was sold at auction under the direction of the executors, being divided into more than 100 lots; deeds were given, not by the executors, but by the five residuary devisees. The deeds were all dated 3d of December, 1835, and are to Gilbert Leggett, for four lots at \$645 per lot; to him for four other lots at \$645 per lot; to Shattuck & Ackland, for eight lots at \$620 per lot, and the $\frac{1}{16}$ of (as is supposed) the residue of the lots, to Joseph Kissam, for \$35,790; he already owning $\frac{1}{2}$ or $\frac{1}{4}$ as a joint purchaser with the doctor, and obtaining by devise from the doctor, $\frac{1}{4}$ of $\frac{1}{2}$, or another $\frac{1}{4}$.

In 1838, some of the lots sold to third parties, were bought by Joseph Kissam at \$525 per lot, and in 1841, some others at \$350 per lot. Mr. Bleecker, the auctioneer, supposed these lots might have brought from \$500 to \$600 in 1836; three-fourths remaining on mortgage.

On the 6th of January, 1836, Joseph Kissam conveyed 42 of the lots held by him, to Samuel Kissam, and Samuel, at the same time, executed to him his bond and a mortgage on the same premises, conditioned for the payment of \$20,000 with interest, on or before the 1st of May, 1843. On the same day, Joseph Kissam executed an instrument of that date, reciting, that Samuel had executed a mortgage to him, on property between 45th and 46th-streets, to secure the payment of \$20,000 and interest, and covenanting with Mrs. Stuart that he held it for her sole and separate use, and that he would account with, and pay over to her, all moneys that he should receive on account of the mortgage—thus far conforming to the former de-

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claration of trust ; but it also adds, what was not in the former, that he will assign the mortgage to such persons as she may designate in writing, and that *in case of her death*, he will account for the moneys or assign the mortgage, as she, by writing under her hand and seal, shall designate and appoint.

On the 4th of February, 1836, Mrs. Stuart, in pursuance of the provisions contained in the last declaration of trust, and by an instrument attached to or written on it, directed Joseph Kissam, in case of her death, to pay over to her husband, Robert Stuart, if he survived her, all moneys that might be due on the bond and mortgage described as "within mentioned," and at his request to assign them to him, and it states that this is executed "by virtue of the provision contained in the *within declaration of trust*."

1st. Was the mortgage given by Dr. Kissam satisfied, and a new one substituted in its place, with the assent of Mrs. Stuart? There are circumstances strongly tending to prove that this was so in fact. The old mortgage was in the possession of the Kissams at the time of the examination, and produced by them. This would not, of itself, indicate much, as Joseph Kissam was the trustee of Mrs. Stuart ; but it is of great weight when it is also found that the first declaration of trust given by Mr. Kissam, was also in his *possession*, and canceled. That indicates strongly, that the trust, under which that mortgage had been held, was in some way, satisfied ; and that on its satisfaction, Mrs. Stuart gave up the declaration of trust, and that the mortgage was then canceled.

The bill admits that Joseph Kissam became possessed of this declaration of trust ; it says by some means ; it does not pretend—except by that insinuation, which amounts to nothing—that it was by any but fair means, and with Mrs. Stuart's assent. It then, also states, that Joseph Kissam executed another declaration of trust, and caused it to be *substituted and delivered* to Mrs. Stuart, as *thereinafter* mentioned, in the *place* of the first declaration of trust. Thus admitting that in fact the second trust, which applied to the second mortgage only, was substituted for the first, which applied to the first mortgage only.

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The most casual reading of the second declaration would show that it referred to a new mortgage, and so that the old one was no longer in force. The old one was by Daniel W. Kissam, jr. to Spencer D. Cotton, in April, 1838, on the whole farm. The new declaration of trust describes the mortgage to which it applies, as given by Samuel Kissam to Joseph Kissam; and as of even date with the declaration, viz. 6th January, 1836, so showing certainly, that it was new, and on premises between 45th and 46th streets. Daniel W. Kissam had been her physician, Spencer Cotton her trustee. Joseph Kissam was then her trustee; the names must have been all as familiar to her as those of her own family. How then could she doubt that she was receiving a substituted security, even if her eyes only glanced over the names in the beginning of the declaration? The statement that the mortgage was of even date with this trust, was a direct notification to her that it was a mortgage just then executed; and as it was for \$20,000, the precise sum held in trust for her before, she must have known it was in substitution of the former security: it described, too, the lands—not as a farm, (as the first mortgage did,) but as certain lands between 45th and 46th-streets. She must have known enough of the farm to know that this did not include the whole farm.

She gave up one declaration of trust, and accepted another: this must have given her knowledge of a change, which would lead her to look into the second. Even if her main object had been to have, in the second, an express power to bequeath the estate, (which she does not alledge,) that would have led her to read the new instrument, and then she could not fail to perceive the change. Though a woman be married, and have a separate estate, and a trustee, yet when the trustee puts before her eyes such clear and express notice of his doings, the same inferences must be drawn as to her reading and understanding the notice, as would be in the case of an unmarried woman, or a man. The evidence of notice to her would not be clearer and not so satisfactory, if a witness had sworn that Joseph Kissam had called on Mrs. Stuart, and told her that he had taken a mortgage from his brother Samuel on part of the farm bought by the doctor of

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her, and held it in trust for her, as the only security for the \$20,000 due to her—and so in place of the doctor's mortgage. Then there would have been a doubt that the witness might not have correctly recollected what took place, or that Mrs. Stuart might have misunderstood the words used. Here, the written notice was put in her hands, which would not have been clearer to her—with her knowledge of the first mortgage and the parties to it—if it had expressly stated that it was in substitution of the first mortgage.

Other circumstances, also, make this probable, and show the good faith of Joseph Kissam. When the new mortgage was given, the price paid by third parties for other lots on the farm, was an average of \$632,50 per lot : 42 lots were included in the new mortgage, which at that price would be worth \$26,565. The Kissams were then in good credit, and it was in the beginning of the year 1836, when all, with few exceptions, were confident of a continued rise in property ; a confidence that was not shaken until more than a year after ; and when, as Mr. Bleecker shows, it was a frequent thing to allow 75 per cent to remain on mortgage. Those who recollect that period, will say he might have expressed himself even more strongly. Under these circumstances it was nothing surprising for Joseph Kissam to substitute a security on only part of the mortgaged premises, and for Mrs. Stuart to accept it.

Subsequent occurrences also confirm this knowledge and assent on the part of Mrs. Stuart. Although her estate was held in trust for her, it was not from any want of affection or confidence in her husband : she showed both, by appointing all this property to him in case he survived her ; and her confidence, by allowing him to act as her agent in collecting her interest. It is a fair presumption of fact, therefore, that in the intimacy and confidence existing between them, the husband actually communicated to his wife all that he knew about her estate. He gave receipts, from time to time, to Joseph Kissam, for moneys paid on account of interest, and then, afterwards, took up these receipts and gave more general receipts, showing the result of the account. Thus on the 25th of April, 1838, he took up seventeen

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receipts which he had before given, and gave one general receipt, showing this fact, and that he had received all the interest due to the 1st of May following, and \$80,41 and \$150 on account of the interest to fall due on the 1st of November following. This receipt states that it is for interest on the bond of *Samuel Kissam* for \$20,000. Another receipt was given, May 2, 1840, showing a balance due to Mrs. Stuart, of \$515,01; it also is expressed to be for "interest on the bond of *Samuel Kissam*." Another was given in May, 1841, showing a balance due Mrs. Stuart of \$617,81, and that receipts were given up for \$1115; it also is "for interest on the bond of *Samuel Kissam*." Another receipt was given on the first of May, 1842, showing a balance of \$719,98 due to Mrs. Stuart; and that one or more receipts were given up for \$1117,80; and it is "for interest on the bond of *Samuel Kissam*."

It would be the duty of Mr. Stuart, and whether his duty or not, it would be natural for him, on taking up the old receipts, to exhibit them to his wife; and they, if in the form of all the other receipts, would again notify her that *Samuel Kissam*, and not the doctor, was her bondsman. As a faithful agent, Robert Stuart would do this; and as a woman careful of her own property, to preserve it from the control or debts of her husband, Mrs. Stuart would require it. If, as intimated, Mr. Stuart was unfit to attend to business, it is more likely that Mrs. Stuart would watch over his doings, and keep herself acquainted with them. She would then know, from Mr. Stuart's communications as to the receipts which he had given, what was the security which she held.

Mrs. Stuart allowed matters to remain thus until August, 1842—a period of more than six years; and did not commence any proceedings until December, 1842; and in the mean time innocent parties had purchased part of the property, not included in the second mortgage, and another had taken part as security for an antecedent debt; and this is probably not protected, if Mrs. Stuart can establish that the last mortgage was never assented to by her, although it may be that he might

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have obtained other security, if Mrs. Stuart had sooner started her objections.

Although good faith must be strictly enforced against a trustee, and he may not be allowed to deal with the trust property to his own benefit; yet here there was no gain intended to be made by Joseph Kissam. So far as appears, the security would have been deemed sufficient at that time, and it was accepted by Mrs. Stuart, who was competent to judge of its value. The bill is not framed to affect Joseph Kissam merely as trustee, but on the basis of the original mortgage being still in force, and then against Joseph Kissam and others as representatives of the mortgagor; and the decree enforces this view of the bill.

The complainant alleges that she and her husband were ignorant of the contents of the new mortgage, until August, 1842; that Isaac A. Johnson, Esq. called on her about the time of the date of the second declaration of trust, January, 1836, and inquired if she wished to leave her property to her husband; that she answered affirmatively; that he then presented a paper for her signature, saying the object was to secure the property to Mr. Stuart, which she with some hesitation, but relying on Mr. Johnson's statements, signed. That he shortly afterwards returned it to her, with another paper attached, which had been annexed after she had signed the first; and that she relying on Mr. Johnson, (whose integrity she does not mean to impeach,) deposited the two in a trunk without ever reading or examining them, and that they remained undisturbed in the trunk until August, 1842. She says the first declaration of trust was delivered to her after it was executed, by delivery, as she believes, to Isaac A. Johnson, who was the counsel employed by Mr. Cotton, and *acting on her behalf on the occasion*, but that she never had actual possession of it.

Mr Johnson was the subscribing witness to that paper; he was examined by the complainant, and he proves that that paper was executed and delivered by Joseph Kissam in his presence. Here the complainant chose to stop. The proof by a subscribing witness, that a paper was executed and delivered in his

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presence, is proof, (not that it was delivered to him,) but to the person for whose benefit it was intended. The proof therefore, is, that the first declaration was delivered to Mrs. Stuart; and as it was afterwards in possession of Mr. Kissam, and another in possession of Mrs. Stuart, she must have given up the first and taken the second.

Mr. Johnson, it appears by this statement, was her counsel at the time of the first trust; she does not impeach his conduct, and his character is too high to admit of impeachment; he *acted for her*, in drawing her appointment in nature of a will, about the same time that the second declaration of trust was executed, and, according to her statement, handed her the appointment and the declaration attached together. It is against all probability, that so careful and honorable a lawyer would have allowed her to execute either paper, without understanding both; and, with the other evidence in the case, the fair inference is, that after six years she had forgotten what the facts of the case were. This conclusion must be drawn, even if the doubtful position assumed by the complainant were to some extent sustained; that, if the defendants rely on the bill to show the substitution, and the bill alleges that the substitution was made in ignorance of the contents of the paper, the defendant must take the latter part of the allegation, or none. If such a rule exist at all, it must be with this limitation, that the allegations favorable to the complainant are not rendered improbable by the other facts, and the evidence in the case; and it probably never was extended to matters which the complainant states in her bill by way of reply to a defense that may be set up, and in anticipation of such defense; that is, more properly, an admission of the defense, and the pleading of new matter in bar of it; in such case the plaintiff must prove the new matter, as the defendant also would be compelled to do, even in a sworn answer, when he introduces new matter. (*See 4 Paige, 507.*) Here the satisfaction of the first mortgage, which was produced in evidence, is *prima facie* proof of its discharge; and the whole case of the plaintiff depends on

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her establishing, that the second mortgage was not substituted with her assent.

In this view of the case, so much of the decree as directs a sale of any, but the forty-two lots last mortgaged, and an account of the estate of Daniel W. Kissam, jr., and of the personal assets which came to the hands of any of the parties to this suit as legatees and next of kin, and of the real estate which came to said parties as devisees, with the other parts of the decree connected with those inquiries, should be reversed with the costs of appeal. A mortgage in favor of William Onderdonk was sustained, as he was a bona fide purchaser for a new and valuable consideration without notice. He appeals probably, because he considers costs should have been given to him. They should have been given to him, as they were to two others against whom the bill was dismissed.

The decree directs an account of the personal and real estate of Dr. Kissam, and of how much of either was received by any party to the suit, as legatee, next of kin, or devisee; and also, an account of all the creditors of Dr. Kissam, who are to be brought in by advertisement; and further directions are reserved, until the coming in of that report.

The object of this reference, is, to subject the share of Dr. Kissam's estate received by any legatee, or devisee, to the payment of any deficiency on the sale of the mortgaged premises.

It may be, that it would be very convenient in this one suit to settle all those various rights. But the legislature, in passing the revised statutes, adopted a different rule, which still remains unrepealed.

Actions may be brought against legatees by a creditor; but then he must show that no assets were delivered by the executor to the next of kin, or that the value of such assets has been recovered by some other creditor, or that they are not sufficient to satisfy his demand. (2 R. S. 452, § 27.) No such allegation is made, but it is declared by the plaintiff, that the testator left \$80,000 over *all* his debts and liabilities; and it is proved that his personal estate was inventoried at \$50,000. The personal estate was the primary fund for the payment of

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any deficiency, and the executors, as such, were the parties through whom that should be reached. Heirs also, may be made liable for the debt of their ancestor, but not unless it appears that the personal assets were not sufficient to pay the same, or that after due proceedings *before the surrogate, and at law*, the creditor has been unable to collect such debts from the executors, or from his next of kin, or legatees. (2 R. S. 452, § 33.) Thus a suit at law against the prior parties is an essential preliminary to a right to sue the heirs. The heirs are to be sued jointly in equity. (*Id.* 454, § 42.)

Devisees may also be liable for the debts of the devisor; (*Id.* 452, § 32;) but not unless it appears that the personal assets of the real estate descended, were insufficient to discharge the debt; or that after due proceedings before the surrogate, and at law, the creditor has been unable to recover the debt. (*Id.* 455, § 56.) The reverse appears here, for the personal estate seems to have been sufficient to pay all the debts; and it is expressly alledged that there has been no accounting before the surrogate.

It makes no difference though the same persons are entitled to the *whole* estate, real and personal.

Bronson, Ch. J., says, in *Mersereau v. Ryerss*, (3 Comst. 261-3,) "It is said that the defendants are entitled to the whole estate, real and personal, and that it is not important to them out of which fund the debt is paid. But the legislature did not so view the matter. The statute makes no exception; but requires the creditor in *all cases* to seek satisfaction from the personal property, before he resorts to the real estate in the hands of the heir." He shows, that in a suit of this kind, whether at law or in equity, all the heirs must be joined; (*Stat.* 1837, p. 537, § 73;) and that the heirs and personal representatives can not be joined in a suit. (3 Comst. 262.) And so are the decisions in 11 *Paige*, 515, (*Wambaugh v. Gates*, affirmed Nov. 1847.) 9 *Id.* 45, 46, (*Schermerhorn v. Barhydt*;) and *Butts v. Genung*, (5 *Id.* 259.) In 9 *Paige*, 46, the chancellor says: "it is no longer allowable for a creditor to file his bill against the personal representatives, and the heirs and

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devisees of the decedent jointly, *either* for the recovery of his own debt, or for the benefit of all other creditors who might think proper to come in under the decree." Yet here the executors are made parties, as such, and a decree sought against them in that character; and at the same time, the heirs and devisees are also made parties, jointly with the executors, and relief sought against them in that character; and although the bill is framed for the benefit of the plaintiff alone, and not for other creditors, the decree seeks to bring in all the creditors of the estate, and settle all their rights in this suit. That part of the decree is unauthorized by the frame of the bill, and the misjoinder is also objectionable.

In 6 *Hill*, 350, (*Gere v. Clarke*), it was also held that the same person could not be sued in one count, as heir and personal representative.

Neither do the provisions in the will of Dr. Kissam make a difference in this case, for his directions are express, that his executors pay *all* his just debts and funeral charges out of his personal estate. This would include the bond debt; though secured by a mortgage, it was one of his just debts, and so was expressly to be paid out of his personal estate; and it was only if that proved insufficient, that the executors were authorized to sell so much of the real estate as would be sufficient to make up the deficiencies. The will, therefore, prevents the 58th section of 2 *R. S.* 455, 456, from applying to this case.

Even, therefore, if the bond of Dr. Kissam were not satisfied, the decree should not have gone further than to order a reference, as against the executors, in case of any deficiency on the sale of the mortgaged premises.

It is not necessary to inquire whether a different rule would apply, if it had been shown that there was a fraudulent combination between Joseph Kissam, Timothy T. Kissam, and Samuel Kissam, to cancel the first mortgage for their benefit. There is no proof of actual fraud, and it ought not to be gratuitously inferred.

. Let the decree be reversed with costs of appeal and of the court below, except so far as it allows a sale of the forty-

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two lots, and the payment of the proceeds to Mrs. Stuart, at least so far as the appellants are concerned ; all other matters can be settled on settling the form of the decree.

[NEW-YORK GENERAL TERM, June 14, 1851. *Edmonds, Edwards and Mitchell, Justices.*]

WADDELL vs. DELAPLAINE & CARTER.

The defendants, creditors of a bankrupt, believing that he possessed, and retained in his possession, or under his control, certain property not disclosed nor surrendered to the plaintiff, who was the official or general assignee in bankruptcy, and that proceedings in law or in equity might be necessary to enforce a delivery of such property, executed a bond to the plaintiff, conditioned to pay, or cause to be paid, all costs, fees and expenses which he should or might incur or sustain by reason of any such proceedings to be commenced by him, and to indemnify and save him harmless therefrom. In an action upon this bond the defendants pleaded *non est factum*, and also a special plea alledging that the plaintiff recovered and accepted from the bankrupt, and others on his behalf, money and choses in action of the value of \$10,000, the property of the bankrupt, and the costs and expenses of the plaintiff's proceedings at law and in equity, and more than sufficient to pay all the legal expenses which he had incurred or paid, &c. To this plea the plaintiff replied that he did not at any time recover or accept from the bankrupt or from any other person, the costs of his said legal proceedings, or any money or choses in action as and for such costs. *Held* on demurrer, that the replication was sufficient.

DEMURRER to replication in an action of debt on bond. The declaration alledged that the defendants, on the 18th December, 1844, executed a bond, by which they "acknowledged themselves to be held and firmly bound unto the said plaintiff, the official or general assignee in bankruptcy, appointed and designated by the district court of the United States for the southern district of the state of New-York, under the rules and regulations of the said court, in the sum of one thousand dollars;" subject to a certain condition thereunder written, whereby, after reciting that John A. Moore, of the city of New-York, merchant, by a decree

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of the district court aforesaid, made on the 17th March, 1848, "had been declared a bankrupt, pursuant to the act of congress, entitled 'An act to establish a uniform system of bankruptcy throughout the United States;' passed August 19, 1841, a copy of which decree, duly certified, had been delivered to the said William Coventry H. Waddell, [the plaintiff,] assignee as aforesaid. And that said bankrupt was believed to possess certain property not disclosed or surrendered to the said general assignee, but which said bankrupt still retained in his possession or under his control; and that certain proceedings at law, or in equity, on the part of the said assignee, might be necessary to enforce a delivery of the same, it was conditioned that if the said John F. Delaplaine and Wellington A. Carter, [the defendants,] their executors, administrators, or assigns, should, and did at all times thereafter, well and truly *pay, or cause to be paid*, all costs, fees of court and counsel, and legal expenses whatsoever, which the said *William Coventry H. Waddell, assignee as aforesaid*, should or might incur, sustain, or be put unto, or become liable, to pay, on account or by reason of such proceedings at law or in equity, and should and did, at all times, well and truly protect, defend, and save, and keep harmless and indemnified the said William Coventry H. Waddell, his estate, property, effects, and representatives, from and against all such costs, fees of court and counsel, and legal expenses whatsoever, then the said obligation to be void; otherwise to be and remain in full force and virtue." The declaration also alledged that proceedings at law and in equity were taken on the part of the plaintiff, to enforce the delivery of certain property not disclosed or surrendered to him by the bankrupt, who retained it in his possession or under his control; and that the plaintiff had paid, for costs, fees of court and counsel, and legal expenses, for and by reason of those proceedings, \$516,30. And in another count it was alledged that the plaintiff had incurred and become *liable to pay*, for costs, fees of court and counsel, and legal expenses, for, and by reason of, proceedings at law and in equity to enforce the delivery of property not disclosed or surrendered to him by the bankrupt, but by him retained in his possession or under his control, the

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sum of \$483,70. Notice and request to pay, and neglect and refusal, on the part of the defendants to do so, were averred. The defendants pleaded the general issue, and also a special plea, stating that the plaintiff, as such assignee as aforesaid, did recover and accept from the bankrupt, and from divers other persons, on behalf of the bankrupt, a large sum of money, and choses in action of the value of \$10,000, the property of, and as and for the property of the bankrupt, "and the costs and expenses of the said alledged proceedings at law and in equity of the said plaintiff, and sufficient, and more than sufficient, to pay and satisfy all, and each, and every the alledged costs, fees of court, counsel and legal expenses whatsoever, which he, the said plaintiff, had incurred, sustained, and been put to, and had paid, or become liable to pay as in said declaration mentioned." To this plea the plaintiff replied, that he did not at any time recover or accept from the bankrupt, "or from any other persons or person whomsoever, the costs and expenses of the said proceedings at law and in equity of the said plaintiff, in the said declaration mentioned, or any part thereof, or any money or choses in action whatever, as, or for the costs and expenses of the said proceedings at law and in equity, or any part thereof, in manner and form as the said defendants" had alledged: and concluded by tendering an issue to the country. To this replication the defendant demurred, assigning the following causes of demurrer: 1. That the replication, although professing to answer, did not answer the whole of said plea. 2. That the replication was uncertain and double. 3. That it was not an answer to the plea. 4. That it tendered an immaterial issue. 5. That it was, in other respects, uncertain, insufficient and informal.

C. S. Roe, for the plaintiff.

P. J. Joachimssen, for the defendants.

By the Court, MITCHELL, J. Waddell was assignee in bankruptcy of John A. Moore, a bankrupt. The defendants executed a bond, reciting this fact, and that it was believed that Moore

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possessed property not disclosed or surrendered by him to the assignee, and that proceedings at law, or in equity, on the part of the assignee, might be necessary to enforce a delivery of the property; and agreeing that the defendants would *at all times* thereafter, *pay* all costs, expenses, and counsel fees, which the assignee should incur, or be liable for, on account of such proceedings; and would always indemnify him against all such costs, fees, and expenses.

The declaration avers that proceedings were had at law, and in equity, on the part of the plaintiff, as such assignee, to enforce the delivery of property not disclosed or surrendered, and which Moore retained in his possession or control; and that the plaintiff has paid and sustained costs, fees, and expenses, on account of such proceedings, to the amount of \$516,30.

The defendant pleads that the plaintiff, as such assignee, recovered from Moore, and other persons on his behalf, a large sum of money, as and for the property of said Moore, and the costs, and expenses of said proceedings; and more than sufficient to pay all said costs, fees, and expenses.

The plaintiff replies, that he did not recover from Moore, or any other person, the costs, and expenses of said proceedings, or any part thereof, or any money, &c., as and for such costs, and expenses; and to this the defendant demurs.

The defendant insists, that the declaration is bad, because it does not alledge that the proceedings at law were necessary. The declaration shows, that the very reason why the bond was given, was, that the bankrupt did not disclose, nor surrender property in his possession: he, therefore was unwilling, voluntarily, to surrender it; and some proceedings at law, or in equity, would, under those circumstances, evidently be necessary to compel a disclosure of what was thus concealed. If on request the bankrupt would make a disclosure, no bond could be necessary to indemnify the assignee; but the creditor could save himself the responsibility, by making the request. When, therefore, the bond says, that certain proceedings might be necessary to enforce a delivery, and that the defendants would pay the costs of *all* such proceedings, it substantially admitted, that some such

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proceedings would be necessary, and threw on the defendants the burthen of alledging and proving that any particular proceeding was unnecessary, after the plaintiff alledges that expenses were incurred in proceedings at law and in equity, for the purpose intended. The admission is at least sufficient to make so much of a *prima facie* case, for the plaintiff, as to prevent the defendant from raising the objection, except by special demurrer.

The demurrer admits, that the plaintiff has not received the costs, and expenses of those proceedings; nor any money as and for such costs, and expenses; although he has received money, &c. the property of Moore, sufficient to pay such costs, and expenses—but not by means of those proceedings. In other words, the assignee has, in some way, unaided by the proceedings, which the defendants instigated him to adopt, recovered other property of Moore, the bankrupt: and these defendants say, that all such property must, when so received, be applied first to pay the costs of these particular proceedings. This assumes that a suit instigated by them, and which, it may be, that every other creditor of the bankrupt opposed, must be so favored, under the bankrupt law, that it should possess an equity superior to all other claims on the bankrupt's estate. The judge in bankruptcy is to pass on that question, and say how that estate is to be distributed. If he considers the proceedings judicious, he may, perhaps, allow these costs a preference; otherwise, he may refuse to allow them at all. The assignee is to sue and defend actions, subject to the orders and directions of such judge. (*Sect. 3 of Bankrupt Act.*) There is no evidence that the judge ever sanctioned these proceedings; and he may, therefore, refuse to allow the costs incurred in them. The bond did not require his previous assent, and may have been given that the defendants might be sure of having the proceedings taken, whether the judge would authorize them or not. If it is to be inferred that he did sanction them, or did not disapprove them because the assignee should be presumed to have acted rightfully, still the judge is to determine whether, under all the circumstances under which this bond was given, he will allow these costs a prior lien on the fund, to all other claimants. What the equities of other claim-

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ants may be, how many other bonds of a like kind there may be, or what other circumstances there are to determine who has the best claim on the fund, is not disclosed here. Under these circumstances the defense can not be sustained.

The defendants have agreed not merely to *indemnify* the plaintiffs—(then perhaps they might say he should wait until an actual loss was sustained)—but they also agreed, *at all times*, to *pay* all costs, and expenses, which he might incur. They therefore must pay him according to their agreement; and if they have any equity on the fund, the judge in bankruptcy will pass upon it.

Demurrer should be overruled with costs; with leave to the defendants to plead.

[NEW-YORK GENERAL TERM, JUNE 14, 1851. *Edmonds, Edwards and Mitchell, Justices.*]

 BULKLEY & CLAFLIN vs. DINGMAN and others.

By written articles of agreement, three persons entered into a special partnership, to continue for a certain limited period; one was a special partner, the others were general partners, and the business was to be conducted in the joint names of the general partners. In a short time afterwards, and before the limited period, a *second* agreement was entered into between them, by which it was agreed that one of the general partners should sell out to the special partner, and should withdraw from all active participation in the business, and that the special, should become a general partner; but that the partnership should not be dissolved until certain notes, given by the firm, should be paid; and that in the mean time the partner who sold out should allow his name to be used as one of the firm, for business purposes, purchasing goods, &c. and giving notes therefor, and the business was continued without any change in the name of the firm. Goods were purchased, and notes therefor given by the two remaining partners, in the original name of the firm, before the expiration of the time limited for the continuance of the original partnership, and before the payment of all the notes mentioned in the second agreement: *Held*, that the *second* agreement made all three of the parties *partners* as to third persons until the notes alluded to therein should be paid; and that all three of the parties were liable on the notes thus given for goods purchased by the new firm.

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THIS was a motion, made upon a case, to set aside the report of a referee. The action was *assumpsit*, brought by the plaintiffs against the defendants, Dingman, Bodine and Martino, as composing the firm of Dingman & Bodine, to recover the amount claimed to be due on two promissory notes, one dated May 12, 1847, by which Dingman & Bodine promised to pay, three months after date, to the order of Bulkley & Claflin, \$420,20; and the other dated five days afterwards, by which the same makers promised to pay, three months after date, to the order of the same payees, \$520. On this last note was an indorsement, Sept. 9, 1849, of \$70,81, signed *Bulkley & Claflin*. The defendant Dingman pleaded *non-assumpsit*; and the cause was by consent of parties referred to a sole referee. It was admitted that on the trial of the cause before the referee the following facts were proved: 1. That the plaintiffs were partners under the firm of Bulkley & Claflin, at the time of the sale of the goods for which the two notes were given, and at the date of those notes. 2. That the signature to the said two notes was in the hand-writing of John M. Bodine. 3. That John H. Dingman, John M. Bodine and Gabriel Martino, executed two agreements which were read in evidence by the plaintiffs' counsel; the first bearing date December 4, 1846, and the second bearing date February 26, 1847. The *first* was an agreement between Dingman, Bodine and Martino, to enter into a limited or special partnership, pursuant to the provisions of the revised statutes, "for the transaction of the business of retail dry goods merchants in the city of New-York, to be conducted under the name and firm of Dingman & Bodine." Dingman and Bodine were to be interested in the partnership as general partners, and Martino was to be interested therein as a special partner only; and it was agreed that the partnership should commence on the 4th of December, 1846, and should terminate on the 4th of December, 1849. The *second* agreement was between the same parties, reciting the *first* agreement, the filing of the certificate of partnership, and the publication of the notice thereof according to law; and reciting also that Dingman was desirous of withdrawing from all active participation in the business, and of assigning

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his present and future interest therein to Martino, who was desirous of becoming a general partner in the business, and the present parties were willing thereto, but it was deemed advisable not to dissolve said partnership until after the payment of certain notes which were given by the said firm of Dingman & Bodine, at or about the time of the formation of said partnership of Dingman & Bodine as aforesaid, a schedule or list of which was thereto annexed, marked A., and in the mean time that said John H. Dingman should allow his name to be used as a partner, for the benefit of the other parties to the agreement. The first, second and third articles of this *second* agreement, related to matters of arrangement between the parties to that instrument; but by the *fourth* it was mutually agreed that the said firm of *Dingman & Bodine* should continue as theretofore, until the notes and liabilities mentioned in the schedule A., or such other notes as might be taken in renewal thereof, should be fully paid and discharged; when (but not until then, unless by consent or at the option of Bodine and Martino) said firm and partnership should be publicly dissolved, and public notice thereof given in the manner prescribed by law, for the dissolution of limited partnerships, before the expiration of the time limited in the certificate of the formation thereof. And thereupon the name of the said John H. Dingman should be withdrawn as one of said firm. That until said notes and liabilities, or notes and liabilities given in renewal or place thereof, should be fully paid, *and until the public dissolution of such partnership*, as therein provided for, *Dingman* should and would, and thereby did allow and consent, that *his name* should be used, by *Bodine and Martino*, as one of said partners or firm, for the benefit of *Bodine and Martino*, for *business purposes, purchasing dry goods and stock for their business, and giving notes or obligations therefor*, and in renewal thereof; but that Dingman should not, from the execution and delivery of that instrument, be interested in, entitled to, intermeddle, or interfere with, directly or indirectly, any of the [then] present or future property or effects of said partnership of Dingman & Bodine, or in the profits or gains thereof, or of said business. The *fifth, sixth, seventh and eighth* articles,

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were merely arrangements between the parties; but by the *ninth*, Dingman covenanted and agreed with Martino and Bodine, that he would not thereafter intermeddle or interfere with their business, *so to be* carried on under said name of Dingman & Bodine, and would allow them *to use his name as a partner in said business, until the public dissolution thereof*, as therein provided for, and would not do any act, matter or thing, to prejudice, hinder or impair the use of his name as such partner in said business, by them. It was further proved before the referee, 4. That after the execution of this second agreement, Dingman left the city of New-York, and had not personally participated or been engaged in business in New-York since that time. 5. That the two notes referred to were for dry goods purchased from the plaintiffs, by Bodine and Martino, in the name of the firm of Dingman & Bodine, for the business carried on at their usual place of business, in the name of Dingman & Bodine, pursuant to the *second* agreement above mentioned. 6. That at the time of the purchase of the goods, and giving the notes therefor, some of the notes mentioned in schedule A. annexed to the *second* agreement, (Feb. 26, 1847,) were outstanding and unpaid. The two notes, copies whereof were annexed to the declaration, were produced and read in evidence; the counsel for the defendant Dingman objected, but the referee overruled the objection, and the counsel excepted. The cause was submitted to the referee, who reported as due to the plaintiffs from the defendants, the sum of \$963,75.

F. R. Tillou, for the plaintiffs.

A. Schell, for the defendant Dingman.

By the Court, MITCHELL, J. On the 4th of December, 1846, Dingman, Bodine and Martino entered into a special partnership, to continue for three years, in which Martino was the special, and the other two the general partners, and the business was conducted in the name of Dingman & Bodine. On the 26th of February, 1847, they agreed that Dingman should withdraw,

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and Bodine and Martino should carry on the business, but that it was advisable *not to dissolve the former partnership*, until after the payment of certain notes given by Dingman & Bodine; and in the mean time Dingman should *allow his name to be used as a partner*; that the firm should continue as theretofore, until said notes should be fully paid, when, *and not until then*, the firm should be publicly dissolved; and that until the public dissolution of the partnership, Dingman should allow his name to be used in purchasing goods, and giving notes therefor.

This last agreement, clearly, made all three of the parties partners as to third persons, until the notes alluded to should be paid: these notes were not paid, and the two notes on which this action is brought were given in the name of Dingman & Bodine, for goods bought for the new firm. The referee was therefore right in finding for the plaintiffs; and his report should be confirmed with costs.

[NEW-YORK GENERAL TERM, June 14, 1851. *Edmonds, Edwards and Mitchell*, Justices.]

CARROLL vs. CARROLL, executor, &c.

An executor, to whom the testator had given full power to sell, dispose of, lease, or mortgage, any or, all of his real estate, for the payment of debts and legacies, and for the division of the balance among the devisees named in the will, by his acts held himself out to the devisees as engaged in winding up the estate, and discharging claims that would be prior to theirs; *Held*, that while he was doing, or professing to do this, the statute of limitations could not run against *them*, who had no rights as against *him*, until those prior claims were paid.

Held also, that every new act of his, in raising money as executor, out of the estate, to pay the debts of the testator, was as effectual an acknowledgment of his continuous acting as executor, and his continued and unbroken liability as executor, as if, in each case, he had promised each devisee or legatee, that he would account as executor.

Held further, that executing mortgages in the character of executor, upon a part of the estate, reciting the power for that purpose given him in the will,

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and alledging that it was "for the purpose of raising funds, to pay off and discharge existing debts and liabilities upon and against the estate of the testator," were acts of this description.

A demurrer must, generally, depend on that which appears in the complaint, (or pleading demurred to,) and not on that *quod non constat*, unless this last is an essential to a *prima facie* cause of action.

If lands are sold by an executor, under a power for that purpose contained in a will, to pay debts, a devisee who has an interest in the residue has a right to an account from the executor, of what the debts of the testator were, and of what amount of personal estate has been received by the executor to pay those debts; that he may know whether such sales are valid; and if valid, whether he is entitled to any, and if so, how much of the money raised thereby.

A fishing bill, in the objectionable sense, is one in which the plaintiff shows no cause of action, and endeavors to compel the defendant to disclose one in the plaintiff's favor. The expression is not applicable to a bill filed by a devisee or legatee against an executor, for an account; although there is an avowed ignorance of the exact amount of moneys that the executor has realized from the estate; that being a matter peculiarly within the executor's knowledge, and which the plaintiff, for that reason, is entitled to "fish out" of the executor, by a prayer for discovery.

IN EQUITY. This was an appeal from an order, made at a special term, overruling the demurrers put in by the defendant Charles H. Carroll, to the amended bill of complaint of the complainant Daniel J. Carroll. The bill was filed in December, 1846, in the court of chancery, by the complainant, one of the heirs, legatees, and next of kin of Charles Carroll, deceased, against the executor, Charles H. Carroll, to obtain a full account of the testator's personal estate; the disposition thereof by the executor; the moneys received by him from the real estate, and what dispositions he had made of them; and a general account of the defendant's transactions as executor; and to have the relief therein prayed for, that the defendant Charles H. Carroll might account; and that the moneys due from him to the estate of the testator might be distributed among the parties entitled thereto. The defendant demurred to the bill as originally filed, and it was amended in November, 1847. The bill set out the last will and testament of Charles Carroll, made the 14th Sept. 1823, containing devises and legacies to his wife, and children, of whom the complainant was one, and appointing the defendant,

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one of the testator's sons, his sole executor, with full power to sell and dispose of all or any part of the real estate, or to lease or mortgage it, for the payment of the debts and legacies, and for the equal division of the balance among the testator's seven children, should a sale for the latter purpose be deemed necessary and proper, by the executor. But the bequests to his children were not to be apportioned among them, until the sum of \$10,000 was taken out for the executor, and the same amount for the testator's wife; nor until all the testator's just debts should be provided for and paid out of his estate. The bill further stated the death of the testator in October, 1823; that in 1824 letters testamentary were issued to the defendant, who took upon himself the duties of such executor, and took possession of all the personal estate of the testator, and of all his real estate, and had ever since acted, and at the time of filing the said bill was still acting as the executor of the estate of the said testator, under the provisions of his will. The bill also showed that in March, 1838, the defendant, describing himself as executor of the last will and testament of Charles Carroll, and reciting the power of sale, leasing and mortgaging contained therein, made two conveyances in the nature of a mortgage, to the Farmers' Loan and Trust Company, for \$43,000; and this was alledged, in those instruments, to be "*for the purpose of raising funds to pay off and discharge existing debts and liabilities upon and against the estate of the said testator.*"

The defendant demurred to the amended bill, alledging various grounds of demurrer to different parts of the bill; but relying mainly upon the statute of limitations.

B. F. Butler and G. Wood, for the plaintiff.

C. P. Kirkland, for the defendant.

By the Court, MITCHELL, J. This bill was filed in December, 1846. It shows that Charles Carroll, the testator, made his will in 1823, and died in October in that year, and left the plaintiff, one of his heirs, legatees, and next of kin, and the defendant

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Charles H. Carroll, his executor; and that the will was proved by the executor in 1824—who, from that time to 1838, has acted as executor, receiving the personal estate, leasing, mortgaging, and conveying the lands, under the powers contained in the will. So late as the first of March, 1838, he mortgaged some of the lands to the Farmers' Loan and Trust Company for \$43,000, for the purpose, as alledged in the mortgage, "of raising funds to pay off and discharge existing debts and liabilities, upon and against the estate of said testator." He, therefore, down to a period within nine years before the filing of the bill, was continuing to act, professedly, in settling up claims against the estate, which must be paid before the heirs or legatees could claim any thing. The will gave him full power to sell, lease, or mortgage any part, or the whole of the real estate, for the payment of the debts of the testator, and of legacies, and for the equal division of the balance among the seven children of the testator. The plaintiff having borrowed \$43,000, as he alledged, to pay the debts of the testator, can not now say, as against the devisees, that the debts were all settled before that, and more than ten years before the bill was filed, and they could, therefore, have called him to account more than ten years ago, for those matters; and are now barred by the statute of limitations. He has, by his acts, held himself out to the devisees, as engaged in winding up the estate, and discharging claims that would be prior to theirs, and while he was doing, or professing to do this, the statute of limitations could not run against *them*, who had no rights as against *him*, until those prior claims were paid. Every new act of his in raising money as executor, out of the estate, to pay the debts of the testator, was as effectual an acknowledgment of his continuous acting, as executor, and his continued and unbroken liability as executor, as if, in each case, he had promised each devisee or legatee that he would account as executor.

He was bound to apply the personal estate, first, to pay the debts; (the testator having died before 1830;) and, if that part of the estate, with the parts received by him on sales, mortgages, or leases of the real estate, was sufficient to pay all the debts of the testator, then the devisees are entitled to compel him to

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account for the \$48,000 raised by him on the 1st of March, 1838, under the pretense (as it then would be) that it was raised to pay the debts of the testator. If the mortgagee would be protected, in such case, by the fact that there are debts still due by the deceased, the executor, who had received the means to pay those debts from other resources of the estate, would not be allowed to keep both in his possession without an account. Even, therefore, if the widow was entitled to all the personal estate absolutely—as her title would be limited to what remained after the payment of debts—the executor must render an account of the personal estate, that it may be seen whether the allegation set up by him when he borrowed the \$48,000, was true, viz. that the mortgage was necessary for the purpose of paying the debts of the deceased. If the personal estate, and other property received by him from the estate, were adequate to pay those debts, that allegation was not true, as between him and the plaintiff; and if not true, he is clearly accountable for the moneys received on that loan. This is a sufficient ground to overrule all the demurrers that set up any statute of limitations. If there are any circumstances, not disclosed by the bill, which would make the statute apply, the defendant can set them up in his answer. It need not now be determined, whether the widow was entitled to the personal estate absolutely, or not; nor whether, if the plaintiff claimed only as legatee, he would be barred: he is entitled to an account of the personal estate for the reasons before stated.

The executor next objects, that he can not be called to account for the real estate, for several reasons: first, because the legal title was in the devisees, and *non constat*, but that they could have had possession at any time.

The bill alleges that the defendant Charles H. Carroll took possession of all the real estate, as well as the personal. This he could do through tenants under him, by virtue of his power of leasing: and then, if the plaintiff could have got possession at any time, it is the business of the defendant to alledge that by way of defense. A demurrer must, generally, depend on that which appears in the complaint, and not on that, *quod non con-*

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stat, unless this last is an essential to a *prima facie* cause of action.

The object of the bill, too, is to make the defendant account, not for what he did not receive, but for what he did receive, and seems limited to what he received under the power of leasing, mortgaging, and selling. This also answers the second cause of objection, viz. that the defendant had only a power of sale, and so was not bound to look after the plaintiff's lands. But he is bound to render an account of what he got on the mortgage, sale, or lease of the plaintiff's lands. The third cause is, that if the defendant sold the lands in the due execution of his power, the plaintiff has no complaint to make; and if he did not so sell, the plaintiff's title is not affected. Neither of these positions is correct. If the lands were sold in the due execution of the power, before the first of March, 1838, the plaintiff has a right to an account of what the debts of the testator were, and of what amount of personal estate has been received by the executor to pay those debts; that he may know whether the mortgage of the first of March, 1838, was valid; and if valid, whether he is entitled to any, and if so, to how much, of the money raised by it.

If the sale was under the pretense of debts being unpaid, when the executor had assets to pay them with, a purchaser might perhaps be protected; and it would, at all events, be more just to resort to the executor, and make him suffer for his wrongdoing, than to sue an innocent purchaser.

It is said the bill is vague and uncertain, and a fishing bill. There is no vagueness nor uncertainty in the allegations contained in the bill. The facts are clearly detailed; nor is there any objectionable vagueness in the relief sought. There is an avowed ignorance of the exact amount of moneys that the executor has realized from the estate; but that is a matter peculiarly within the executor's knowledge, and which the plaintiff, for that reason, is entitled to "fish out" of the executor by a prayer for discovery. A fishing bill, in the objectionable sense, is one in which the plaintiff shows no cause of action, and endeavors to compel the defendant to disclose one in the plaintiff's favor. A bill for discovery and relief shows (as this does) a cause of action,

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and prays for the discovery of particular facts, alledged to be true in fact, but which are peculiarly within the knowledge of the defendant. The matters here to be discovered are merely matters of account, and are merely evidence, and that not so much that the plaintiff has a cause of action, as what the amount of his recovery should be.

The bill is said to be multifarious. It relates, in fact, to one single matter, the agency of the defendant as executor of the estate: and every thing introduced into the bill, arises out of that one subject; for this reason the account is required of him; for this reason among others, the plaintiff insists that the mortgages to the Farmers' Loan and Trust Company, and to the North American Trust and Banking Company, are not valid: and those companies had a common interest with the executor to show that from the true state of the accounts, there were debts of the testator still due, which authorized the mortgages or deeds to them.

There being this sufficient ground for making the companies parties, there was nothing to prevent the plaintiff from showing that the conveyances held by those companies were bad, also, for other reasons. The companies do not raise the objection; but the executor is not injured by the companies' being parties; but he is benefited, as the decision to be made in this action will save litigation hereafter, on the same subject, between him and those companies.

The order at special term, overruling the demurrers, should be affirmed with costs.

[NEW-YORK GENERAL TERM, JUNE 14, 1851. *Edmonds, Edwards and Mitchell*, Justices.]

STROUD vs. FRITH.

Parol evidence can not be given to explain an agreement, so as by it to show, what the parties *agreed to do*.

But, when terms of art are used, and have acquired a definite meaning, known to those engaged in a particular business, but which are not plain on the face of the agreement, evidence may be received as to what that meaning is.

Thus, parol evidence may be received to show what is the business of a "cabinet and mahogany door-maker," and that it includes only the making of doors of mahogany and ornamental woods.

If, from the answer given by the judge to an inquiry of the jury, a party is apprehensive that the jury may be led to an erroneous supposition, he should suggest that to the judge, and not except merely, in general terms, to an instruction which is correct in fact.

Where the jury are correctly instructed on the questions of law, a doubt concerning the weight of evidence, is no sufficient reason for disturbing their verdict.

THIS was an action brought by the plaintiff, an infant, by his next friend, against the defendant, for breach of covenant, for not having taught the plaintiff, who had been bound an apprentice to him, the trade of a cabinet maker. The facts of the case are sufficiently stated in the opinion of the court.

D. McMahon, jr., for the plaintiff.

C. Lawton, for the defendant.

By the Court, MITCHELL, J. The plaintiff sued the defendant on a covenant, by which the defendant bound himself to use the utmost of his endeavors to teach the plaintiff the trade of a cabinet, and mahogany door-maker. The covenant was not to teach him the trade, but to use his utmost endeavors to do so; and the proof that the defendant had done this, (so far as his own trade was concerned,) is too strong to justify the court in setting aside the verdict as against evidence. This leaves open the question, whether the plaintiff's trade came within the description of trade contained in the covenant. The plaintiff contended that the trade described was cabinet making,

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and mahogany door-making; the defendant, that it was only one trade, known in the trade and by the plaintiff, and his father, as cabinet and mahogany door-making. The plaintiff began by giving evidence to show the meaning of these words—his first witness testifying that he never heard of such a trade as *cabinet* door-making or cabinet and mahogany door-making, but had heard of cabinet making and mahogany door-making. The defendant, on his part, and in reply to this proof, proved by Mr. Brown, that Frith's business was like his, (the witness') and that the term "cabinet and mahogany door-making," *was used* to designate their business. The plaintiff objected and insisted that this was giving parol evidence to explain a written agreement. Parol evidence can not be given to explain an agreement, so as by it, to show, what the parties *agreed to do*. But when terms of art are used, and have acquired a definite meaning, known to those engaged in it, but not plain on the face of the agreement, evidence may be received as to what that meaning is. Thus, no one, not familiar with the trade, could tell all that a lad should be taught, who was to learn the trade of a cabinet maker; nor would one know, from the words alone, that a mahogany door-maker, was one who made the frame of the door of *pine* wood, and only laid on veneers of mahogany. So too, it is an almost daily occurrence in the United States district court, to have evidence as to the commercial understanding of what is any article included in the United States revenue laws.

This evidence was, therefore, admissible. The judge, it is said, went beyond this, and allowed evidence that the plaintiff, and his father, knew what the business was that the defendant carried on. But the judge allowed this, (as his charge showed,) not as evidence of what the meaning of the words was, but only to ascertain whether the plaintiff, and his father, knew of that meaning; and in his charge to the jury, he only authorized a verdict in favor of the defendant, if they should find not only that the "cabinet and mahogany door-making" was a *distinct* business in the city of New-York, and that the defendant was

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in that trade, but also that the plaintiff, and his father, *knew* that the defendant was in that trade.

The jury inquired if the plaintiff learned the trade as carried on in the defendant's shop, whether that would be all that was necessary. The judge answered "yes, provided the jury should find that it was known to the parties that the defendant was engaged in the trade and business of a cabinet and mahogany door-maker."

The proviso implied that the jury must find that the defendant was engaged in that business, and that this was known to the parties; for it could not be known to the parties that he was engaged in the business, if he was not actually so engaged. If the plaintiff apprehended that the answer would lead the jury to suppose that the knowledge by the plaintiff of what the defendant's business was, would bind him, though the defendant was not actually a cabinet and mahogany door-maker, he should have suggested that to the judge, and not have excepted merely, in general terms, to an instruction which was correct in fact.

The struggle of the plaintiff was, to show that he had not been taught the trade of a cabinet maker, as distinct from that of a mahogany door-maker. Yet it is evident that the only trade he was to be taught, was that of a door-maker. The two nouns forming the compound word "door-maker" are joined together as one by a hyphen in the declaration, in the oyer of the indentures, in the pleas, and in the plaintiff's points, and it was understood on the argument, that they are so in the indentures. The only noun, therefore, that cabinet or mahogany is connected with is, the one word door-maker; and the trade to be taught was, therefore, (so far as the indentures alone show,) the one trade of making cabinet and mahogany doors, or of making cabinet doors and mahogany doors. There was no such distinct trade as cabinet door-making, although there is of mahogany door-making, and of cabinet and mahogany door-making. It appears that the defendant's business was not only making mahogany doors, but also doors of rose wood, satin wood and pine wood, and that this kind of door-making is a branch of the *cabinet business*. This explains how the term cabinet is joined

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to mahogany. The business to be taught was not only mahogany door-making, but cabinet door-making, including in the two terms, the making of rose wood, satin wood, and even highly polished pine doors, as well as mahogany doors.

In this view of the case, the verdict is not against the weight of evidence. Besides, it is very questionable whether the plaintiff could show any actual damage, if he has been taught the door-making business, and not the cabinet business. Those damages are not to be proved by a witness stating them in a lump at \$1000, but by proof of what the wages are that can be obtained by a journeyman in the one business, and what in the other. One witness says, that better wages could be got at *door work* than cabinet; another, that the plaintiff said he could get employment at cabinet work, but would not, the wages were so low. The plaintiff, when he left the defendant, received \$4 a week, and in seven months afterwards received \$6 a week, and the proof is that journeymen cabinet makers receive from \$4 to \$9 per week, which is an average of \$6,50 per week; and it is not extraordinary that at first the plaintiff should receive the lowest wages.

The jury were correctly instructed on the questions of law, and there is no sufficient reason to disturb their verdict.

New trial denied, with costs to the defendant.

[NEW-YORK GENERAL TERM, June 14, 1851. *Edmonds, Edwards and Mitchell*, Justices.]

BARKER vs. RUSSELL and others.

Section 179 of the code of procedure allows an arrest, when the defendant has been guilty of a fraud in contracting the debt, for which the action is brought; and by section 183 the order for arrest may be made at any time before judgment. It is to be made when it appears on affidavit, that a sufficient cause of action exists, and that the case is one of those mentioned in section 179.

It would be a great innovation in pleading, to require the pleadings to show

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that the plaintiff was entitled to arrest the defendant in an action on contract. It was not the practice to do so under the former law, when a non-resident could be arrested and taken on a *ca. sa.*; nor under the non-imprisonment act of 1831, where the defendant could only be imprisoned in actions on contract, when something like fraud was established.

The complaint is to state the facts constituting the cause of action. If the cause of action be a contract, the facts establishing the contract are all that are to be stated: not the facts which are to determine the extent of the remedy; especially, where the law has directed the latter class of facts to be established by affidavit, to the satisfaction of a judge, and not of the jury.

An execution may be issued against the person of a defendant who has been guilty of a fraud in contracting the debt on which the action was brought; although the summons in that action, be, in form, on contract, for money only, the complaint in contract only, not noticing the fraud on which the order for the arrest of the defendant was grounded; and the judgment in accordance with the complaint.(a)

In a suit against bail, in the supreme court, that court may grant relief to the bail, although the original action was in another court; and may allow a temporary stay of proceedings, to enable them to surrender their principal.

Bail are not estopped from such equitable relief, on account of any delay arising from a mistake of a new law, in a matter in which counsel and judges have differed.

THIS was an appeal brought by the plaintiff, upon an order made at a special term, granting a stay of proceedings, on the

(a) There are various and conflicting decisions, in the reports, on this point. In the case of *Squire v. Flynn*, (8 *Barb. S. C. Rep.* 169,) EDMONDS, Justice, on a motion, at the *New-York special term*, February, 1850, discharged the defendant, who was arrested on execution; saying, that, in a case like that before him, "a debtor can not be arrested unless he has fraudulently contracted the debt, and a judge's order has been obtained, and an undertaking has been given. The mere existence of the fact, that the debt has been fraudulently contracted, is not enough to warrant an arrest. That fact must be accompanied by a judge's order, and an undertaking. All three of these requisites must unite to justify an arrest." In the case of *Gridley v. McCumber*, (5 *Howard's Pract. Rep.* 414,) at the *Jefferson special term*, January, 1851, it was held, by Hubbard, justice, that a *personal execution* can not be based upon an order of arrest, *dehors* the judgment in the action. That the nature and office of an execution is not changed by the code of procedure; as formerly, it can only issue to enforce the judgment. And in the case of *Corwin v. Free-land and others*, (6 *Howard's Pract. Rep.* 241,) at the *Tioga general term*, May, 1851, before Mason, Monson and Shankland, justices, it was decided, that an

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motion of the defendants, who were sued in this court, as bail for a party who was arrested in an action on contract, brought in the New-York common pleas, for money only. The arrest was ordered, on affidavits showing that the defendant, in the original action, had been guilty of a fraud in contracting the debt on which the suit was brought. In that suit, the plaintiff declared only in contract, without noticing in the complaint, the fraud on which the order for arrest was grounded. Judgment was obtained in that suit, execution issued first against the property of the defendant, and next against his person; and then the plaintiff brought suit in this court, against the bail, who were non-residents of the city and county of New-York. The facts of the case are stated in the opinion of the court.

By the Court, MITCHELL, J. The original action was in the New-York common pleas. The summons in that action was in form on contract, for money only, and conformed to the first subdivision of § 129 of the code. The affidavit on which the arrest was ordered showed that the defendant had been

execution must follow the judgment, and be warranted by it. That an order of arrest before judgment, under § 179 of the code, is in no case a justification, or evidence of a justification, for an arrest on final execution. On the other hand, Welles, justice, on an application to him, at chambers, March, 1851, in the case of Cheney v. Garbutt, (5 Howard's Pract. Rep. 467,) refused to set aside an execution against the defendant's person, and held, that it was not necessary that the complaint should contain the allegations which authorize the defendant's arrest or imprisonment, in order to issue an execution against his person, where he has been arrested after the service of the complaint, and before judgment, under § 179 of the code of procedure. And Harris, justice, at the Albany special term, December, 1851, in the case of Masten v. Scovill, (6 Howard's Pract. Rep. 315,) denied a motion to set aside an execution against the defendant's person, and held, that the true criterion for issuing an execution against the person of a defendant after judgment, is this: could the defendant have been arrested before judgment, under the provisions of the chapter of the code of procedure, relating to arrest and bail? not whether an order of arrest has been actually obtained before judgment, nor whether the pleadings show a statement of facts upon which he might be arrested. That judge also expressed his dissent to the decisions in Squire v. Flynn, and Gridley v. McCumber; and his approval of the views of Welles, justice, in Cheney v. Garbutt.

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guilty of a fraud in *contracting* the debt on which the action was brought, and that the action was brought for the debt so contracted. The plaintiff declared in contract only, not noticing in his complaint the fraud on which the order for arrest was grounded, and obtained judgment, and issued his execution against the property, and then against the person of the defendant; and now, as the bail on the arrest are non-residents of this county, sues them in this court.

The defendants moved, at special term, for a stay of proceeding, and it was granted, and the plaintiff appeals.

This court, in *Secor v. Roome*, in June, 1849, decided at special term, that allegations of fraud were irrelevant in the complaint in a similar case, and should be struck out, and the general term, in September, 1849, affirmed that decision, with costs. It is understood that the common pleas in this city hold the same rule; and it has been also adopted in this district in one other case at special term. On the other hand, a county judge has in one case discharged a defendant from a *ca. sa.* where the record of the *judgment* did not show, on its face, a right to arrest.

The 179th section of the code allows an arrest, among other cases, when the defendant has been guilty of a fraud in *contracting the debt* for which the *action* is brought; or when the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors. By section 183, the order for arrest may be made at *any time before judgment*; and it is to be made when it appears on *affidavit*, that a sufficient cause of action exists, and that the case is one of those mentioned in section 179.

It certainly would be a great innovation in pleading, to require the pleadings to show that the plaintiff was entitled to arrest the defendant in an action on contract. It was not the practice to do so under the former law when a non-resident could be arrested and taken on a *ca. sa.*: nor under the non-imprisonment act of 1831, when the defendant could only be imprisoned in actions on contract. when something like fraud

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was established. If the fraud were alledged in the complaint, it might well be considered that that was the gist of the action, and then if the plaintiff should fail in satisfying a jury that there was fraud, though a judge might have ordered the arrest, and the defendant never denied before the judge, the frauds alledged on affidavit, the plaintiff must have judgment against him. The summons must show whether the action is on contract or not, (§ 129,) and actions of contract, and actions for injuries to property, though without force, are not to be joined together. (§ 167.) It might well be objected that there was a misjoinder, if the action was on the contract, and at the same time the fraud was put in issue.

So too, (§ 142,) the complaint is to state the facts constituting the cause of action. If the cause of action be the contract, the facts establishing the contract are all that are to be stated ; not the facts which are to determine the extent of the remedy ; especially when, as in this case, the law has directed the latter class of facts to be established by affidavit, to the satisfaction of a judge, and not of the jury ; and that judge, too, might be in another court, as the order of arrest may be granted by a county judge. (§ 180.)

The complaint is to be served within a limited time. But the order of arrest may be granted after issue is joined, and even *after verdict*, the only restriction being that it is to be *before judgment*. (§ 183.) This seems clearly to show that the *pleadings* are not to show the right to arrest ; else, how could it be allowed after issue joined ? Even if the record admitted the fraud, the judge could not grant the arrest unless the fraud was made to appear to him by *affidavit*.

The 179th section also authorizes an arrest, where the defendant has been guilty of fraud *in contracting the debt on which* the action is brought. This shows that the debt contracted may be the sole foundation of the action, and the action be brought on the debt alone, and yet the arrest be allowed, if the defendant was guilty of fraud in contracting that debt.

So too, the 5th subdivision of the 179th section allows an

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arrest without reference to the origin of the action or the form of it, when the defendant is about to remove or dispose of his property, with intent to defraud his creditors. Could it be that the allegation of this intention is to be put in a complaint on contract, or for libel or slander, or any other tort; and that if not stated, the defendant could not be arrested, though he were notoriously removing his property to defraud his creditors? It would require a clear indication of the intention of the legislature, to justify such a construction. To prevent any such opinion, the 181st section shows how this fraud is to be established; viz. by affidavit to the judge; and that section distinguishes between the *cause of action*, and the *case* which authorizes an arrest under § 179; showing that the case which authorizes an arrest, is not part of the cause of action.

It was said there was a variance between the complaint and the affidavit on which the arrest was granted. This is not so in fact; the affidavit shows that the action was on contract.

It was admitted that this court might grant relief to the bail, although the original action was in another court. It may be proper, therefore, to allow the defendants a temporary stay of proceedings, to enable them to surrender their principal. The order below should be modified accordingly. It allows a perpetual stay. This court should make the same order that the court below should have made; it is not proper, therefore, to compel the defendants to make a new motion at special term. The bail are not estopped from this equitable relief, on account of any delay that arose from a mistake of a new law, in a matter in which counsel and judges have differed.

There is a further reason why a perpetual stay should not be granted here. If the bail are right they can set up their defense by way of plea, and the plaintiff can demur to it, and in that way the point could be passed on by the highest court.

Let the order be so modified that proceedings be stayed for 40 days, to allow the defendants to surrender their principal; and let them have 20 days to plead to the complaint in this action; the issue to be of the time when the plea was first due;

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and after issue joined, let all proceedings be stayed until the end of said 40 days.

[NEW-YORK GENERAL TERM, JUNE 14, 1851. *Edmonds, Edwards and Mitchell, Justices.*]

 ROBINSON vs. WEST.

Neither a justice's court, nor the marine court of the city of New-York, acquires jurisdiction of the cause, where the defendant, being a non-resident, is sued by a summons, returnable more than four days after its date, or served more than two days before the return day; and even if the defendant, when brought before the court by such illegal process, should ask for and obtain an adjournment, and, under force of that process, plead to the action, it will not authorize the entry of a judgment against him.

It seems, that where the statute declares, expressly, that a justice shall have no jurisdiction of the cause, if the defendant be not proceeded against as the law prescribes, this strips the justice of all official authority, and he possesses no more power to accept a waiver, and thus acquire jurisdiction, than a private individual would have.

THIS was a writ of error to review the judgment of the superior court of the city of New-York, on certiorari to the marine court of that city.

In the superior court, errors of fact were assigned, by the plaintiff in error, as follows. 1st. That he was a non-resident of the city of New-York. 2d. That he was sued in the marine court of that city, in an action of *assumpsit*, by being summoned six days before the suit, instead of by a short summons. 3d. That he was not liable to be sued, in that court, except by a short summons, returnable not less than two, nor more than four days from the date thereof. The defendant in error joined in error, and thus admitted the facts; thereby presenting an issue of law, which was passed upon by the superior court. And its decision being adverse to the plaintiff in error, he brought his writ of error thereon to the supreme court. The facts relative to the proceedings in the marine court, are stated in the opinion of the supreme court.

Robinson v. West.

E. H. Hudson, for the plaintiff in error.

Wightman & Clark, for the defendant in error.

By the Court, MITCHELL, J. The plaintiff in error, although he was a non-resident of the county of New-York, was sued in the marine court of that city, by West, in an action of assumpsit, on a summons returnable ten days after it was issued, and served six days before the return day.

The non-imprisonment act (*Laws of 1831, p. 403, § 33*) provides, that in such cases, the defendant shall be proceeded against by summons, or attachment, returnable not less than two, nor more than four days from the date thereof; "and if such defendant be proceeded against otherwise, the justice shall have *no jurisdiction* of the cause." Section 47 of the act, makes this section applicable to the marine court.

A number of cases have been cited to show, that when an informal process is issued, a defendant waives the informality by appearing, and pleading over. In those cases, the practice of the court, or the statute, prescribed certain forms, but did not declare that the omission of them should prevent the court from having jurisdiction. In such case the court might well hold that the objection to the want of form, in process, was waived by a plea which admitted that the party was properly in court. But here, the statute is imperative: it expressly declares, that, "if the defendant be proceeded against otherwise, the justice shall have *no jurisdiction* of the cause." It does not make any exception to this—as, that the justice shall have no jurisdiction, unless the defendant plead over, or waive the objection—but it positively precludes the justice from acquiring jurisdiction, if the defendant be proceeded against otherwise than as the law prescribes. The legislature, no doubt, had a motive in this: they meant to protect the non-resident defendant from being sued out of his own county, except in the prescribed manner. They may have apprehended that if they only forbade it, plaintiffs, and inferior courts, would disregard the law, trusting that the defendant, by his ignorance of his rights, might so act as to waive

them. And to prevent any chance of this, the law may have been made as it is, expressly that the justice shall have no jurisdiction of the cause if the defendant be not proceeded against as the law prescribes; thus stripping the justice of all official authority, and giving him no more power to accept a waiver, and acquire jurisdiction, than a private individual would have. As Chief Justice Oakley says, in an analogous case, (*Cornell v. Smith*, 2 *Sandf. Sup. Ct. Rep.* 291,) "the imperative direction to dismiss the suit precludes any waiver from being inferred by pleading over to the action and going to trial." This statute is stronger than a direction to a justice, in certain events, to dismiss a suit, as that would almost imply, that he once had control over it. But here, the beginning of jurisdiction is prevented, by the words of the act.

The court below say that the defendant, by pleading over, must have agreed to enter an action in the court, without process. This would be to infer an agreement, contrary to all the facts of the case, brought home to the knowledge of the court, by the record before it. The return shows that the defendant was brought before the court by this illegal process; and that it was under that process that he asked for an adjournment and obtained it, and asked that he might send for counsel, and got ten minutes to do it in, and under the force of that process he pleaded—and by virtue of that process, and not of any agreement to enter the action without process, the plaintiff took judgment against the defendant, in his absence, after waiting more than an hour for his return. The process is returned as the foundation of the action, and no agreement to enter the action without process is pretended, in the return. To infer such an agreement, under these circumstances, is to do violence to one's common sense. The suit being commenced by process, an agreement to *enter* the action without process, could hardly be established, without an express abandonment of the process, or an express agreement to enter or commence the action anew, without process.

The plaintiff below should have abandoned his judgment, as soon as his error was detected, and then he would have had no reason to complain, and would have suffered but little loss.

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The judgment should be reversed, with costs of this court and of the superior court.

[NEW-YORK GENERAL TERM, June 14, 1851. *Edmonds, Edcards and Mitchell*, Justices.]

KEMEYS and SAMPSON vs. RICHARDS and others.

Where a promissory note belonging to a partnership, is transferred or paid over by an individual member thereof, in satisfaction of his own private debt, it is incumbent on the plaintiffs, in a suit brought upon such note, to show the assent of the other partner, in order to bind *him*.

And such knowledge and assent must be clearly shown, and not left to be inferred from vague and slight circumstances.

The question of assent is a question of fact, peculiarly within the province of a referee, with which the court ought not to interfere, if it be merely doubtful whether he was correct in his conclusion on that matter, or not.

The report of a referee may be sustained, although he improperly admits some testimony, if, on rejecting that, enough remains to sustain his report.

THIS was an appeal, by the plaintiffs, from a judgment rendered in favor of the defendants, Charles J. Richards, James A. Fleury and Henry B. Richards, on the report of a referee.

The action was commenced by the plaintiffs, William Kemeys and George G. Sampson, against the defendants above named, and Robert P. Lee, jun. as makers and indorsers of a promissory note, made by Richards (*Charles J.*) & Fleury, payable to their own order, for \$1093,70, six months after date, for value received, and indorsed by *Richards & Fleury to Lee & Richards*; and which was indorsed by Lee & Richards, (*Henry B.*) as the plaintiffs alleged, to them, and they claimed to be the legal owners and holders of the note. The defendants Charles J. Richards and James A. Fleury, put in an answer denying that the plaintiffs were the legal owners and holders of the note, and denying that Lee & Richards indorsed it to them. They alleged that the note was transferred to the plaintiffs, in payment of a private or individual debt of Robert P. Lee jun., without the

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knowledge or consent of Henry B. Richards, and that the plaintiffs had knowledge of the facts. They further alledged that the note was the property of Lee & Richards, or of Henry B. Richards, and that they, Richards & Fleury, had a legal set-off against the amount due on the note, and that Lee & Richards were indebted to them in a sum equal in amount to that due on the note. And they further alledged that they had notice from Henry B. Richards not to pay the note. Henry B. Richards answered separately, making the same answer, in substance, as Richards & Fleury; and alledging the note to have belonged to Lee & Richards, and afterwards to himself, and that it was then his property. Robert P. Lee, jun. made no answer.

The plaintiffs replied to the answer of Henry B. Richards, and denied the matters of defense set up in his answer; and they alledged that the note was charged, in the books of the firm of Lee & Richards, to the private account of Robert P. Lee, jun. by Henry B. Richards, or with his approbation or consent. They also replied to the answer of Charles J. Richards and James A. Fleury, and denied the matters of defense therein set up. They alledged that the note was charged in the books of Lee & Richards to the private account of Robert P. Lee, jun. by Henry B. Richards, or with his approbation or consent. They also alledged that Richards & Fleury had recognized the plaintiffs as the legal holders of the note, and had treated it as a valid note in the hands of the plaintiffs. They alledged ignorance as to claims of Richards & Fleury against Lee & Richards. The cause was by consent of both parties referred to a sole referee; who after hearing the witnesses of both parties, reported in favor of the defendants, Richards & Fleury and Henry B. Richards.

J. Cochran, for the plaintiffs.

E. H. Nichols, for the defendants.

By the Court, MITCHELL, J. The action is on a note, dated 27th May, 1848, at six months, for \$1093,70, drawn by Richards & Fleury to their own order, and indorsed by them, and by

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the firm of Lee & Richards, consisting of Robert P. Lee, jr. and Henry B. Richards. The answer of H. B. Richards alleges that the note was indorsed by Lee, and by him delivered to the plaintiffs, in payment of his private debt, and without the knowledge or consent of Richards; and that the plaintiffs had full knowledge of these facts. The plaintiffs, in their reply, deny none of these allegations, except the one that the indorsement was made without the consent of Richards: that, therefore, was alone at issue; and the pleadings admitted that the note was transferred to the plaintiffs for the private debt of Lee, and that this was known to the plaintiffs. According to the decisions in our courts, (whatever the law may be in England,) it was then incumbent on the plaintiffs to show the assent of Richards, in order to bind him. (*Wilson v. Williams*, 14 *Wend.* 156. *Gansevoort v. Williams*, *Id.* 133 to 138.) This knowledge and assent must be clearly shown, and not left to be inferred from vague and slight circumstances. (*Everingham v. Ensworth*, 7 *Wend.* 328. *Rogers v. Batcheler*, 12 *Peters*, 229.) But it was affirmatively proved that the note was given to the plaintiffs in payment of a debt of Lee alone, contracted before he became a partner of Richards.

Whether Richards assented, was a question of fact, peculiarly within the province of the referee, and with which we ought not to interfere, if it were merely doubtful, whether he was correct in his conclusion on that matter, or not. But, in fact, there is no evidence of his assent. The proof to sustain the assent, was an entry made in the partnership books, by Lee alone, in September, 1848, four months after the note was dated; in which he charged himself with the note. But Richards was away from the city, when that entry was made; and when he first saw it, said that Lee had no right to use the note for that purpose: this was not until about the 10th of October, 1848: and he also said, that that entry ought not to be there. This disproved his assent.

Exception was taken to some testimony admitted by the referee; but it is immaterial, and may be rejected. The report of a referee may be sustained, although he improperly admits some

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testimony, if, on rejecting that, enough remains to sustain his report.

The report must be confirmed, with costs.

[NEW-YORK GENERAL TERM, JUNE 14, 1851. *Edmonds, Edwards and Mitchell, Justices.*]

HONE vs. KENT, executor, &c.

A will is to be interpreted by the intention as gathered from the whole of its provisions; and not by the meaning of words, that would result from their derivation.

A testator, by the sixth clause of his will, gave to his son, (who was also the sole executor,) his "Commentaries on American Law," four volumes, with the right of renewal of all previous and future editions, according to law, and all other rights and privileges appertaining to the copyright, and to so much of the then existing edition [the fifth] as might remain unsold at his (the testator's) death. But he thereby charged upon this bequest of the copyright, one moiety of the net proceeds arising after his death, from the sales of the work, to be held by his son, and his son's representatives, during the existence of the copyright, in trust, for the sole use and benefit of the testator's two daughters, E. H., (the plaintiff,) and M. S., and their respective lawful representatives; the one-fourth part of such net proceeds and profits to be paid to each. In the eighth clause of his will, the testator gave all the residue of his estate, real and personal, specifying as part of it, "*unsold Commentaries on hand,*" (subject always to the life estate of his wife,) as follows, viz.: First, one equal undivided third part to his son, his heirs, &c. Second, one other equal undivided third part to his son, in trust for the sole and separate use of E. H., during the joint lives of herself and her husband; and in case of her surviving her husband, then the principal and interest to be transferred to her; in case her husband should survive her, the principal, &c. thereof, remaining unpaid to her, to be transferred to her lawful issue, &c. Third, one other equal undivided third part, (being the remaining portion of his residuary estate,) to his son, in trust, for the sole and separate use of M. S. The testator died on the 12th of December, 1847. All the copies of the 5th edition of the Commentaries were sold previous to his death. In November, 1847, the printing of the 6th edition was commenced, and parts of the 1st, 2d and 4th volumes, (but no part of the 3d volume,) were printed before the testator's death. The printing was continued by the executor after the death

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of the testator, and the work was published and the copyright taken out by him, in the spring of 1848. *Held*, that E. H., (the plaintiff,) did not take the one-fourth part of the net proceeds of the sixth edition, by virtue of the sixth clause of the will; but that those proceeds passed to the residuary legatees, under the eighth clause of the will.

THIS was an appeal by the defendant, William Kent, from the whole of the judgment entered on the report of the referee appointed in this case. The plaintiff, Eliza Hone, wife of Isaac S. Hone, by her next friend, Frederick Anthon, filed her complaint against William Kent, executor of the last will and testament of James Kent, deceased, praying that the executor might come to an account with her, of the one equal fourth part of the net proceeds of the sixth edition of the testator's work, entitled "Commentaries on American Law," to which she claimed to be entitled, according to the sixth item of said will. All others interested in the will were made parties defendants, and put in their respective answers. The bill set out the will *in extenso*, but all the portions of it material in the decision of the questions involved in this action are sufficiently stated in the opinion of the court. The death of the testator on the 12th of December, 1847, after having made his will, and leaving the same in full force, uncanceled and unrevoked, was stated in the bill. The answer of the defendant, William Kent, the executor, admitted the making of the will, and the death of the testator afterwards, leaving the will uncanceled and unrevoked, as stated in the bill; but claimed, that the surplus proceeds of the said sixth edition of said Commentaries, were, as he was advised, to be disposed of according to the provisions of the eighth, instead of the sixth clause of said will. The cause was, by consent of parties, referred to a sole referee, who reported that the plaintiff was entitled to an immediate payment of one-fourth of the net proceeds of the sales of the sixth edition of Kent's Commentaries, according to the provisions of the will set forth in the complaint in the cause, and that the defendant, William Kent, should account for and pay over to the plaintiff, such her one-fourth part of said proceeds, viz. the sum of \$767.19; and the one-fourth part of all such profits

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as should thereafter accrue from the said sixth edition. And that the defendant, Mary Kent Stone, was entitled to recover in like manner. And that none of the parties to the action were entitled to costs, as against any other party thereto.

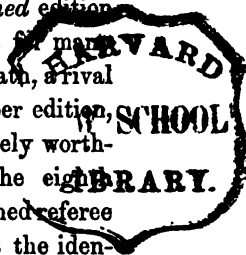
C. O'Connor, for the appellant. The plaintiffs claim that the partially executed edition of the Commentaries, upon which Chancellor Kent was engaged at the time of his death, and which had not been completed or published, passed under the sixth clause of his will. The executor, acting in opposition to his own interest, but in defense of the rights of infants entitled in remainder, is advised to resist the action. He is advised, and therefore insists, that this unfinished and unpublished edition formed part of the goods and chattels of the testator at his death, and that as such it came to him as executor, with the power and duty of completing it so as to fit it for sale; and of treating the proceeds of such sale as part of the testator's residuary estate, to be disposed of under the eighth clause of the will. All that passes under the sixth clause is divisible into three parts, one half to William Kent, and one quarter to each of his sisters. All that passes by the eighth clause is subject to a life estate in the testator's widow, the capital going in three equal shares; *but with remainders to issue limited upon the shares of the daughters*. Mrs. Kent, the widow, having assented to the prayer of the plaintiffs' bill, there could be no controversy, but for these remainders. The question then is, what passed by those clauses, *i. e.* the sixth and eighth respectively. And on this point, there is no dispute, save in respect to the sixth edition, being that upon which, as before stated, the testator was engaged at his death. The primary object of the testator, as expressed by himself, was to provide for his widow, "to leave her during the remainder of her life as completely independent in her income as" he himself was. To this object he devotes the subject of his first gift, embracing in terms all his estate. A strongly worded exception in the last or residuary clause, shows his steady adherence to it. He certainly intended her to have "the possession and use of all his estate,

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real and personal, during her natural life," except what is expressly given to others. And, among the things so to be devoted to her use, and for this purpose enumerated in the eighth clause, are his "unsold Commentaries." To defeat in any degree the intent thus clearly manifested, there must be clear and strong words. We will now look to the sixth clause, and see whether it gives these partially completed books to the children. That clause is a gift of the copyright or the incorporeal right of multiplying copies, so far as that right might have any valid legal existence as property, either under the existing acts of congress, or otherwise. Its whole tenor shows this. He calls it "this bequest of the copyright of my Commentaries." Without attempting to dispute that this is the bequest, a narrow and technical argument has been advanced, to carry into the bequest of the copyright a portion of the goods and chattels of the testator, left at his death, as a sort of incident to the gift of the copyright. It has been sustained to the whole extent by the referee: and it is respectfully submitted, that his conclusion is erroneous. The argument in support of it seems shortly to be this: that an *edition*, as that phrase is used by the testator, means a perfected work, which had been *published* at his death. We have not heard *from counsel* how the argument would deal with an edition, of which three volumes had actually been published and extensively sold, and of which the last volume was in the binder's hands, only requiring to be lettered. We know how the *referee* would apply it. The essential basis of this argument is, that inasmuch as the whole copyright was given by the sixth clause, the beneficiaries under the eighth clause could not have a right to complete and sell any books in their hands; for that would be an infringement of the copyright. We will endeavor to show that there is no soundness either in the verbal criticism on the word *edition*, or in the legal criticism which has generated an imaginary conflict between the sixth and eighth clauses upon our reading of them. The testator was the father of equity in America, deeply learned in every department of legal science, and for half a century an approved expounder of the import of statutes, of the ancient dicta of the common

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law, and of every class of public and private documents. It would indeed be strange, if his own last will and testament, drawn by his own hand, and most deeply engaging, as on its face appears, his tenderest affections, should be obscure or doubtful. We think it is not so. If to the general intent—which is always to be preferred—and to the particular wording, which must be supposed to have received profound attention, we give due heed, the construction will be easy. It is most manifest, that the testator did not intend the gift in the sixth clause, to interfere with the income to be derived by his widow during life from his whole estate. He might have left, at his death, a very large, completed, perfected, and *published* edition of the Commentaries, sufficient to supply the market for many years. Did he intend to erect, instantly upon his death, a rival interest in the copyright, which, by a new and cheaper edition, could drive from the market and render comparatively worthless, the “*unsold Commentaries*,” given under the eighth clause, for his widow’s benefit during life? The learned referee not only supposes that he did so intend, but also that the identical copies on hand of all such Commentaries, *i. e.* the whole unsold portion of the last edition actually published by the testator in his lifetime, also passed under the sixth clause. If it did so pass, it passed without requiring from the legatees any contribution toward its cost. We do not purpose to devote ourselves to the inquiry, whether the will is so constructed as to confine the authority to renew “*previous editions*,” or “the existing edition,” and publish “*future editions*,” so as to prevent this rivalry, which might interfere with the widow’s interest in the “*unsold Commentaries*.” We think it very manifest, that the words employed do work this effect. We only refer to this view of the matter, to show how steadily the testator kept in view, and how cautiously he protected, the primary object of his testament, *i. e.* the securing of ease and competency to the surviving partner of his long, virtuous, and honorable life. The very wording of the sixth clause itself, directly refutes the position advanced by the plaintiffs, that an *edition* means an edition *published*; and of the position of the referee, that any



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books, or goods or chattels, were intended to pass under it. It contains its own glossary. Every word in it that could require interpretation, is interpreted. No room is left to hesitate as to its meaning. The testator describes the whole clause as "a bequest of the copyright." He gives, not the "*existing edition*" itself; but, in connection with the subject of copyright, he gives "the *rights and privileges appertaining* to so much of the then existing edition, as may remain unsold at his death." It is a familiar maxim, that things "appertaining, pass by a gift of the principal thing, as incident thereto." But here, it is contended that we have a gift of the thing "*appertaining*," made to carry its principal with it. The ancient maxim is reversed, and the principal now follows the incident. The man pursues his shadow. Let us return to the testator's words. He contradistinguishes, by apt words of discrimination, the only three kinds of editions that appear in the case. He speaks of "*previous editions*," a "*then existing edition*," and "*future editions*." It will be noticed that *then* refers to the time of his death, and not to the date of his will. The idea that to constitute an edition, a publication is necessary, is completely repelled by these discriminations. If publication was the crowning work which constituted an *edition*, nothing could be an edition which was *not* published; and every thing would be an edition which *was* published. *All editions* would then be *previous* or *future*. But the testator speaks of a third kind of edition, not embraced by either of those terms, *i. e.* an *existing* edition. What does this import? He speaks as an author who had already prepared many editions; who might prepare or be engaged upon another edition at the time of his death; and who, well knowing the great value and high reputation of his work, contemplated *future* editions to be edited by his son, after he had filled an honored grave. The mere incorporeal right of multiplying copies in respect of all these, he gave to his son; and he charged upon "*this bequest of the copyright*" as a deduction, "*all expenses of printing and publishing future editions*." He gives his son "exclusive control, in his discretion, of the copyright, and of the *future* editions thereof,

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and of the corrections, improvements or additions to be from time to time made to the Commentaries ;" and as a compensation for these services "*in respect to the same*," i. e. not only in respect to the future editions, but in respect to the Commentaries as an entirety, he gives his son "the remaining moiety or half part of the net profits of the *future* editions. The sisters take the other half between them. The edition *existing* at the testator's death remains untouched by all these dispositions. If any labor devolved on Mr. William Kent to perfect that edition for sale, it was charged upon him by the bequest, and his share of the profits of *future* editions is his compensation. It is plainly so expressed. But it has been said that a gift of the copyright to the beneficiaries, under the sixth clause, would be inconsistent with a right in the beneficiaries under the eighth clause, to have the existing edition completed and published for their benefit. This argument goes too far; it would defeat their right to convert into money the unsold "Commentaries," expressly bequeathed in the eighth clause. But to this idea there are many answers: First, the donee of the copyright is both executor of the will, and legatee in this behalf; and the thing given to the beneficiaries under the sixth clause, is the *profits* of the future editions, not the copyright itself. Secondly, the rules of law require all parts of a will to be taken together, and each to qualify the other, so as to make the whole harmonize, if practicable—which is very easy in this case. And, thirdly, if there was a conflict, the last intent would prevail; and that is the gift of the "unsold Commentaries" in the eighth clause. Cases may be supposed, where either construction would seem incongruous in practice. If the testator had devoted years of time and labor to an edition, and had it in every respect completed except publication, or, say a small part of the binding; that edition, to the great detriment of his widow, and palpably against his own intentions, would pass under the sixth clause, if the plaintiffs are right. Again, it may be said, that upon the defendant's reasoning, one note, written by the testator for another edition, would make it the *existing* edition. An argument may always be perplexed by extreme cases like these.

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They scarcely ever arise in actual life; the good sense of parties subscribes to the rule of law, "*de minimis non curat lex*." In the present case, the court must view an author who was always engaged upon a present, or existing *edition*; that edition he contemplated as a different subject from completed editions, and editions thereafter to be begun. Any edition, which he had so far progressed in as to give it a potential, though in some sense inchoate existence—which, as it stood, in its incomplete condition, was valuable property, constituting part of his stock of goods and chattels,—he intended should pass, like the rest of his goods and chattels, under the residuary clause in his will. No gift which he may have made of the *profits of future* editions, can ever interfere with or disturb this bequest.

John Anthon, for the respondent. The plaintiff contends that the testator, in his last will and testament, must be considered as using English words in their proper acceptation, and technical terms, according to their legal effect. That, in this view, when he speaks of an *edition* of a work, especially in connection with the copyright, he means a work duly issued, and made public according to law. When he speaks of "*unsold volumes*," he means completed volumes ready for sale, and that this view and interpretation is strengthened and made conclusive, when he speaks of the same volumes as "*on hand*." The plaintiff also insists that by "*existing edition*," he means one which has been duly published as aforesaid, and then actually for sale, which would become a "*previous edition*," when exhausted by sales, and its place supplied by a "*future edition*" and successor. It seems to the plaintiff that this glossary does not require too much from the eminent testator, when, in the law, as much would be attached to the testamentary words of any common person.

The plaintiff also insists, that the testator must be considered as fully understanding the legal effect and bearing on existing rights of a bequest of "the copyright of a book," and inasmuch as such bequest would necessarily become perfect by the death of the testator, he must be especially considered as understand-

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ing that it would be at the option of the owner of the copyright, *at what time* a new or future edition should appear, or whether it should appear at all; and also that he well understood that in the law there could be no difference in this particular, whether the title to the copyright was in the executor as a gift, or in a third person. It is presumed that if these matters are conceded, which the law, as well as a due respect for the memory of the deceased, seems to require, there can be no difficulty in interpreting the provisions of his will, without involving it by suppositions in any of the extravagancies hinted at by the appellant's counsel, as connected with the *imperfect* progress at his decease, of a *future intended* edition.

Another preliminary matter meets us at this stage of the case, which the counsel for the appellant seems to think exercises considerable influence over the provisions of the will. He says the primary object of the testator, as expressed by himself, was to provide for his widow; we do not think so. On the contrary, while on the one hand, he was clearly anxious to consult her comfort, he was equally desirous to promote and advance the *immediate* interests of his children, for it will be seen that so soon as he announces the one intention, he proceeds immediately to make specific devises and bequests of important parts of his estate for the *immediate* benefit of his children; which devises and bequests are recognized and fully sustained in the eighth item, on which the present controversy turns. His wife and children were equally dear to him, and this equality of affection is the equity which pervades the instrument.

Having premised these matters, we are ready to approach the question in this cause, which is simply, who is entitled to the edition of the commentaries *published after* the decease of the testator, under the *authority* of William Kent, the then *owner* of the copyright? The learned and experienced gentleman to whom this cause was referred, decided: (1.) That the contract made by the testator for the publishing of the sixth edition of the commentaries, and the partial printing of the volumes during his lifetime, did not amount to a publication of that edition; that such a publication did not take place until after the decease of

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the testator, and under and by virtue of the copyright vested by the deceased, in William Kent. (2.) That the sixth edition of the commentaries published by William Kent after the decease of the testator, falls under the sixth item of the testator's will, and the proceeds are to be distributed accordingly. (3.) That Elizabeth Kent took no interest whatever under said will in the said sixth edition, so published after the decease of the testator. The effect of this decision is to advance the *present* interests of the children of the testator, by giving them the immediate enjoyment of the proceeds of the edition, in the proportions fixed by the testator in the sixth item; a result most manifestly in accordance with his views, and very strongly upheld by the release of all right on the part of his widow, to any part of this interest, thus admitted by her to be so obviously in the right channel. A contrary determination would be a practical destruction of all essential present benefit, and would be productive of a very doubtful and remote advantage to children and to grandchildren. The effect would be to cause the executors to *isolate* this sixth edition, to *invest* the *proceeds*, and divide the accruing interest, (amounting to some two or three hundred dollars,) among four parties for their lives, remainder among an unknown number of grandchildren, each share or remainder thus finally becoming a valueless pittance. This was not the testator's intention, nor is it in the spirit of his will. It is admitted, nevertheless, that if upon examination it shall be discovered that the law sternly requires this interpretation, the children of the testator must yield to it; however absurd, as a benefit, the result would be, and however hostile to his well known intentions. With this preface, let us examine and see if there is any thing in the question raised. The condition of the testator's property at the time this will was published, will, in many particulars, indicate his meaning in the use of words; and this is legally and properly resorted to in cases of doubt, to aid such interpretation. Now it appears in this case, that at the time of the publication of this will, the *fifth* edition had been *duly published* by the learned author, and there were copies of *that edition* in his hands *unsold*. It is therefore natural that at the time he wrote

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this will, this condition of his property should be uppermost in his mind, connected, perhaps, with the idea of continued life, and possible future editions. Consequently, the phrases then used by him to describe this particular species of property, were used in their proper acceptation, with reference to the then present state of things, and the possible future, and could not have been misunderstood, had his will gone into immediate effect. The changes from lapse of time create the doubt, so far as a doubt exists, and lead to present controversy. What then were these changes? The testator lived some years after the making of this will, and at the time of his death, the fifth edition, existing, and to which he clearly referred when he made his will, had been disposed of, and preparations were making to publish the sixth, of which, however, none of the volumes were "*printed, published,*" or "*on hand*" for sale. Both of these conditions affect the interpretation of this will, and exert an influence over it. Now, then, on the subject under consideration, it is to be remarked that there are two clauses or items which would have been manifestly in conflict, had any of the commentaries remained *on hand unsold*, at the time of the testator's death, viz. the sixth and the eighth items. In the sixth he bequeaths to his son William, "*so much of the then existing edition as may remain unsold at his death,*" and in the eighth, having enumerated the residue of his property, and included as part of it, "*unsold commentaries on hand,*" he again bequeaths the one-third of such residuary property to the same person, his son William, and the residue to others. Now, if words are taken in their ordinary acceptation, this conflict becomes quite unimportant, because at the time of the testator's decease, there was no aliment for either bequest, the fifth edition existing and on hand when the will was made, being exhausted, and the sixth edition not in existence.

It is contended, however, by the appellant's counsel: (1.) That the eighth item contains the last expression of the testator's intention, and supersedes the sixth. (2.) That the words "*unsold commentaries on hand,*" in that item, would embrace an *inchoate edition*, with a *potential* existence. (3.) That the law would compel William Kent, because he is executor of the will, as well

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as legatees of the copyright of the commentaries, to give such edition a legal existence by publication, for the purposes of the will. In this way a new state of things would be created after the decease of the testator, and a will made for him, which he most manifestly never contemplated. This, nevertheless, so far as it is intelligible, seems to be the burthen of the appellant's argument; but he cites no case to show that any court of law or equity ever took so decisive a step as he recommends in the present instance, to produce a result so clearly in opposition to the language of a testator, and in effect, to make a testament for him. The entire argument too, it is worthy of remark, proceeds on the *admission* of the non-existence of any new edition at the time of the testator's death, or of any volumes ready for sale, and rests on a metaphysical assumption of a potential existence of an edition. When such potential existence may be said to commence, whether when the idea is first conceived in the editor's mind, or upon penning the first note, or when the work has progressed to an unlettered fourth volume, we are not informed by the appellant's counsel, and are most certainly without any aid in the law. This would suffice to dispose of this nicety, even if unincumbered with the great and insurmountable objection of an assumed power of compelling the owner of a copyright, to make use of his property against his will, for the benefit of others, by some forced inference of duty entirely unexpressed by the testator. I must confess myself at a loss to understand how the law would or could deal with such a case, or what learned annotations would be the result of such legal coercion. I believe the court will agree with the respondent, that none of these refinements were at all in the mind of the enlightened testator, and that the origin as well as the entire foundation of the learned theory of the appellant's counsel is to be found in a mere *oversight* of the testator. He had plainly bequeathed all copies of the commentaries on hand at the time of his death, to his son, by the sixth item; the insertion, therefore, of the words "unsold commentaries," in the subsequent *enumeration* of the *residue* of his *personal property*, was a mere casual slip or inadvertence, which might naturally enough happen in copying in such state-

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ment in a residuary clause. "*Debile fundamentum fallit opus*," would seem then to be the maxim disposing of the entire theory of the appellant, resting on such a basis. To return, however, from these mere visions of the appellant, and close the subject rationally; we conclude that taking the language of the will, according to its common acceptation, as our guide, the testator has bequeathed to William Kent the absolute and unqualified copyright in all future editions of his commentaries, and that this necessarily embraces all publications of the work after the death of the testator, which would require the sanction of the owner of the copyright. That nothing short of such *publication* can create an *edition* which from its very Latin root, implies publication, and which, without publication, has no existence. This plain view of the subject, we think, seems most consistent with the testator's parental feelings in behalf of his children, inasmuch as it produces to them the greatest benefit, and the more so as it relieves the case from all the supposed difficulties attending inchoate and potential existences, and all the absurdities growing out of imperfect progress at the time of the testator's death, in any contemplated edition, alien to the frame of the testator's mind. The whole will thus becomes like the testator himself, a plain, unostentatious and simple act; while the view taken by the appellant, would make it unnecessarily subtle, metaphysical, and refined, overlaying obvious intention with difficulties, and defeating kind intentions most manifestly expressed. We therefore trust that the views and decree of the referee will be affirmed.

B. D. Silliman, for James K. Stone and the other infant defendants, submitted their rights and interests upon the same points as those relied upon by the defendant William Kent.

By the Court, MITCHELL, J. Chancellor Kent made his will, dated 22d August, 1846. He died on the 12th of December, 1847, leaving his widow, and his son William Kent, and his daughters Mrs. Hone, the plaintiff, and Mrs. Stone, his only heirs at law. A number of the children or grandchildren of his daughters also survived him. He had published five editions

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of his celebrated "Commentaries on American Law," and disposed of them, so that none of them remained on hand.

On the 16th of November, 1847, he made three separate contracts with printers, for printing the four volumes of that work, one to print two volumes, and each of the others, one. He also, on the same day, contracted with a paper manufacturer for all the paper for the four volumes. At his death, parts of the 1st, 2d and 4th volumes were printed, but no part of the 3d volume. The four volumes were printed and published in May, 1848; and then the copyright for the 6th edition was taken out by William Kent, in his own name. He sold a considerable part of the edition, and has in his hands, \$3,068,77, after paying all expenses, and also some unsold copies of this edition.

The plaintiff claims that this edition passed under the sixth clause of the will. William Kent, who is executor, resists this claim, and insists (though it is against his own interest to do so,) that it passes under the eighth clause.

The counsel for the plaintiff urges that it must be assumed that one so distinguished as the testator, would use language according to its strict meaning, and with great exactness. A young and inexperienced person, probably, studies more the literal meaning of words, than one long accustomed to the interpretation of instruments. The latter is daily compelled to discover the true meaning of others, by examining the whole scope of what they have said or written, and may thus be content in his own writing, if the whole scope of it be clear, without regard to the precision which a student would aim at. That precision, too, is more likely to be found among conveyancers than among either counsel or judges. So in this will, the testator begins by giving to his wife, for life, the use of all his estate, real and personal, and, as if to show that he meant it to be without exception, he declares that his object in this, is to leave her as completely independent in her income as he is; yet, in the next clause, he gives to his son William Kent in fee, nearly all of the farm near the Summit, in New-Jersey, and all the furniture, carriages and moveable property on it. Also, all his books and manuscripts of every kind, constituting his libra-

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ry, and his vault. He also gives to his daughter, Mrs. Hone, his pew in Calvary church, and to Mrs. Stone, the rest of the farm in New-Jersey; and in the seventh clause, gives to Mrs. Hone \$1,000, as an equivalent for the farm devised to Mrs. Stone. It would be somewhat doubtful whether these gifts were not subject to the widow's life estate. A careful *young* lawyer would probably have anticipated such a doubt, and changed the phraseology so as to prevent it. One more experienced, might be content to see that a fair interpretation of the will would remove any doubt. When the bequests were intended to be subject to the life estate of the widow, the testator so expressed himself, as in the fifth clause, where he gives his daughters a limited choice of the furniture, but "subject to their mother's life estate therein;" and in the eighth clause, where he gives his residuary estate, "subject always to the life estate of my dear wife as aforesaid."

This reference to other parts of the will, is important only, to show that this will is to be interpreted as all others—by the intention as gathered from the whole; and not by the meaning of words, that would result from their derivation.

In the sixth clause the testator gives to his son, William Kent, his Commentaries on American Law, with the right of *renewal* of all previous and future editions, and all other rights and privileges appertaining to the copyright, and to so much of the then existing edition, as may remain unsold at his death. He adds: "but I hereby charge upon this bequest of the copyright, one half of the net profits arising after my death from the sales thereof, after deducting all expenses of printing and publishing future editions, and all other expenses appertaining to the custody, care and sale of the Commentaries, to be held by my son during the existence of the copyright, for the separate use of Mrs. Hone and Mrs. Stone." He gives the reason for making this disposition, and it aids very much in determining the extent of the gift. It is, that he deems it advisable that his son should have the legal right and title, and exclusive control in his discretion of the copyright, and of the *future* editions thereof, *and of the corrections, additions and improve-*

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ments, to be from time to time made to the said Commentaries, and as some compensation for his trouble, labor and responsibility in respect to the same, that he and his legal representatives should have to their own use, the remaining half of the net profits of the future editions and sales of the Commentaries.

The testator knew the value of the work which has spread his name through his native country, and given him a deserved reputation abroad; he was naturally desirous of preserving both its high character, and its value as property, and knew that for this purpose, as successive editions would be called for, they must conform to the successive changes in the law. For this reason he selected an editor whose reputation as a judge, and as a lawyer, were such as to secure undiminished confidence on the part of the public, in the accuracy and learning of the book; and whose close relationship would make him feel his own fame identified with that of the testator. He was to have the exclusive control of the *copyright*, and of the *future* editions, and of the *corrections, additions and improvements*, to be from time to time made to the Commentaries: and it was as some compensation for his trouble, labor and responsibility, in respect to the same, that he was to have half the net profits. It follows, then, that where he had not the exclusive control of an edition, and no control over the corrections, additions and improvements to be made to it, and no trouble, labor or responsibility, in respect to those corrections, additions and improvements, he had not earned the compensation allowed for those peculiar services, and was not to receive it. In this case, the testator had made all the corrections, additions and improvements to the edition, and had assumed not only all the trouble, labor and responsibility, in respect to these services, but the trouble, labor and pecuniary responsibility, also, of completing all the contracts for the publication of the 6th edition. With the light thus shed by the testator, on his own meaning, it is not difficult to understand what was intended to be given by this sixth clause. But he is his own expositor again; after making the bequest he says: "I charge upon *this bequest of*

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the copyright of my Commentaries," showing that all he meant to give was the mere copyright, or the right to the son to *cause to be published*. Here the testator had exercised that right as to the 6th edition: he had *caused* it to be published, so far that the work must be completed, or his estate buy off the contractors to abandon the work which they had commenced.

When in the beginning of this clause, he gives to his son the Commentaries, with the right of renewal of all previous and future editions, it is plain he means to give the bare copyright. The term renewal would be inapplicable to any other right, and is peculiarly appropriate to that right. The addition, "and all other rights and privileges appertaining to the copyright," shows again that the mere copyright was the principal gift, and anything connected with the gift was connected only as an incident to the copyright. The testator, in order to include every possible incident of a copyright, adds "rights and privileges appertaining to the copyright, and *to so much* of the *then existing edition* as may remain unsold;" that is, rights of publication appertaining to that edition. He did not mean to give the books themselves, or any interest or title in the edition existing at his death, (except to republish them); for in the eighth, which is the residuary clause, he expressly gives all "unsold Commentaries on hand," to his residuary legatees.

The gift to the son, of the mere copyright, with the statement that the donee was to make corrections, additions and improvements in the work, and was to have the labor, trouble and responsibility in respect to the same, and the express gift to others, of all unsold copies of the work on hand, make it sufficiently clear that this edition, which the testator had himself edited, and contracted to have published, could not be included in the gift to the son. The claim of the plaintiff is as a specific legatee: she must show that this particular property was in contemplation of the testator when he made the will, or within his clear meaning. If that can not be established, she can not take it, but it must pass to his residuary legatees, who take all that is not specifically bequeathed. It is probable that he did not contemplate such a state of

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things as has occurred; and if his will has not provided for it in this sixth clause, it has in the *general* disposition made in the residuary clause. If the words "unsold volumes on hand," used in the residuary clause, do not include this edition, the words "the residue of my estate, real and personal," do. It is not material, therefore, to inquire whether these unfinished volumes could be called "unsold volumes on hand," or not

The judgment should be reversed, but without costs; and a judgment entered declaring that the net proceeds of this 6th edition, are to pass under the eighth clause of the will.

[NEW-YORK GENERAL TERM, June 14, 1851. *Edmonds, Edwards and Mitchell*, Justices.]

ELLISON vs. MILLER.

A testator, by his will executed previous to the revised statutes, devised the use of all his real estate, to his wife, during widowhood. In 1831, after the revised statutes took effect, the testator became seised of other lands, by purchase, and died in 1833, without having altered, or republished his will. *Held*, that the lands acquired in 1831 did not pass to the widow, under the will, but descended to the heirs at law of the testator.

THIS was an action for the recovery of real estate. The facts appear in the opinion of the court.

A. Fadden, for the plaintiff.

S. L. Griffin, for the defendant.

BROWN, J. Charles Ellison, the plaintiff, seeks to recover one equal fifth part of certain lands in the town of Hempstead, county of Queens, described in the declaration. The plaintiff claims as tenant by curtesy, as husband of one of the daughters and heir at law of Henry Miller deceased. The marriage

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and death of the wife, and living issue of the marriage in the life time of the wife, were admitted upon the trial ; but her seisin depends upon the legal effect to be given to the will of her father. This will was made and published on the 27th of November, in the year 1818, and was not afterwards republished. He therein devised to his wife, Abigail Miller, the use of all his estate real and personal, as long as she remained his widow, for her to live upon and bring up his children. The defendant is in possession as the tenant of Abigail Miller, the devisee, who still continues his widow. After the publication of this will, and on the 12th day of May, 1831, the testator acquired the title to the lands claimed, by purchase, under a deed of that date, from Thomas Treadwell and Lydia his wife, and then died seised thereof in the year 1833, leaving five children, including the wife of the plaintiff.

Under the old law, unless the testator, at the time of making and publishing the will, had the legal or equitable estate in the lands claimed to be devised, nothing passed. The statute of 32 Hen. 8, ch. 1, explained by the act of 34 Hen. 8, ch. 5, enacted "that all persons being seised in fee simple, (except *femes covert*, infants, idiots and persons of non-sane memory) might by will and testament in writing, devise to any other person, except to bodies corporate," &c. A will of lands made under authority of these statutes, was considered by the courts of law, in the nature of a conveyance, declaring the uses to which the land should be subject, and upon this idea of a conveyance is founded the distinction between such devises, and bequests of personal chattels, that the latter will operate upon whatever the testator dies possessed of, but the former only upon such real estate as was his, at the time of executing and publishing the will. (2 *Black. Com.* 378. *Cruise's Dig. tit.* 35, 3. *Devise, ch.* 3, 25, 26. *Goodtitle v. Otway*, 7 *T. R.* 399. *Lady Strathmore v. Bowes, Idem*, 482.) The act concerning wills, passed March 5th, 1818, which was in operation when the will of Henry Miller was published, is very similar in its language with the English statute of Hen. 8, for it provides "that any person having an estate of inheritance, either in severalty, in coparcenary, or

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in common, in any lands, tenements or hereditaments, may, at his own free will and pleasure, give or devise the same, or any of them, or any rents or profits out of the same, or out of any part thereof, to any person or persons (except bodies politic or corporate) by his last will and testament." The judgment of the courts upon this statute has been, that to pass the estate the testator must have been seised at the time the will was made, and continue so seised up to, and at the time of his death. (*Jackson v. Holloway*, 7 *John. Rep.* 394. *Jackson v. Potter*, 9 *Id.* 312.) In order to pass such equitable interests as courts of equity would enforce, it was indispensable that the agreement to purchase should have existed prior to the devise. (*McKennon v. Thomson*, 3 *John. Ch. Rep.* 307. *Malin v. Malin*, 1 *Wend.* 625.) Such was the law in regard to the transmission of real property by devise, at the time the will under which the defendant claims the title was made; and it remains to be seen how far the rule which would then have governed the rights of the parties has been changed by the statute of wills, which took effect on the first of January, 1830.

The fifth section of the act concerning "wills of real property and the proof of them," (2 *R. S.* 2) is in these words: "Every will that shall be made by a testator in express terms of all his real estate, or in any other terms denoting his intention to devise all his real property, shall be construed to pass all the real estate which he was entitled to devise at the time of his death." A will does not take effect from its date, but from the time of the death of the testator; and its provisions are to be governed by the law as it exists at the time it takes effect. Both before and since the revised statutes, when the subject matter given was personal estate, the will is to be regarded as speaking at the death of the testator; but until those laws took effect, where the subject given was real property, it was regarded as speaking from the date, for the reason given by Blackstone, that a devise was deemed a conveyance, and could only operate upon such estate as the testator had power to convey at the time the will was dated. Such also may be said to be the fair import of the language of the old statute of wills. The present statute has, however, taken away

this distinction, and it gives to words which denote the testator's intention to devise all his real property, the same effect as is given to words of similar import, in respect to personal property. The language of the 5th section is, however, qualified in respect to wills made before 1830, by that contained in the 70th section of the same title, which is, that the provisions of the title "shall not be construed to impair the validity of the execution of any will made before this chapter shall take effect, or affect the construction of such will." That is to say—the fifth section provides that every will that *shall be made* by a testator, of all his real estate, or in any other terms denoting his intention to devise all his real property, shall be construed to pass all the real estate which he was entitled to devise at the time of his death." While section 70 declares that wills *which had been made* before the new statute took effect, shall not be so construed. Both sections speak of the construction of wills: the 5th, that wills that shall be made, are to be construed in a given way, and the 70th that wills then already made, shall not be so construed. What lands of a testator should be deemed to pass to his devisee, under a devise of all his real estate, was manifestly regarded by the framers of the statute, as a question of construction solely; and the language of the 70th section indicates the clearest intention that in respect to wills made before the statute took effect, the old rule of construction should undergo no change, but remain as it always had been.

In opposition to this conclusion, I am referred by the counsel for the defendant to the case of *Bishop and others v. Bishop*, (4 Hill, 138,) and to the case of *De Peyster v. Clendening*, (8 Paige, 295.) These two cases, as I read them, involve precisely the same legal principle, to wit: that the provisions of a will, and the nature and validity of the estate thereby created, depend upon the law as it exists at the time of the death of the testator, that being the time when the will takes effect. In *De Peyster v. Clendening*, the will was made and published before the provisions of the revised statutes became the law of the land, but the testator died long afterwards. Amongst other things, it created a trust of real property, of that particular

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class which the 47th section of the article concerning uses and trusts turns into a legal estate, and vests in the cestui que trust. The chancellor held that the will took effect—not from its date—but from the death of the testator, and that its provisions must depend upon the law as it was at that time. That the 70th section of the act concerning wills of real property, and the proof of them, was not broad enough to reach the case under consideration; and that the provisions of the article relative to uses and trusts, and of the title of the 4th chapter, relative to accumulations of personal property, and expectant estates in such property, might impair the validity of the provisions of a will made before January, 1830, and when the testator did not die until after that time. It is apparent, without further remark, that the question was not upon the construction of the will, and the sense to be attributed to the language which the testator had chosen to employ; but upon the force of the 47th section of the statute of uses and trusts upon the provisions of a will made before the statute took effect. In *Bishop and others v. Bishop*, the will was published in 1825, and the testator died in 1840. The premises in dispute were devised in fee to Clement Bishop, a son of the testator, who died in 1833, in the life time of his father, leaving the defendant, George Bishop, his son and heir at law. By the law as it was when the will was made, and before the 1st of January, 1830, the devise would have lapsed. The only question presented for the judgment of the court was, whether this devise was not saved to the child and heir at law of the devisee, by force of the 52d section of the title concerning wills and testaments, &c. (2 R. S. 9,) which provides that “whenever any estate real or personal, shall be devised or bequeathed to a child or other descendant of the testator, who shall die during the life time of the testator, such devise or legacy, shall not lapse, but shall vest in the child, or other descendant of the legatee or devisee.” The court decided that the will did not take effect until the testator died, which was in 1840, and then the case fell under the influence of the new statute. Mr. Justice Bronson, who delivered the opinion, says, “Section 70, 2 R. S. 268, only goes to the execution and construction

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of wills made prior to 1830, and does not touch this question." The question did not arise upon the execution, or the construction of the will; but upon the power of the 52d section, to save from destruction that which, without such aid, must have been declared to be a lapsed devise.

I am of opinion that the lands in question, did not pass to Abigail Miller, under the will of Henry Miller, but they descended to his heirs at law.

The plaintiff is entitled to judgment, for the premises claimed in his declaration.

[QUEENS SPECIAL TERM, June 16, 1851. *Brown*, Justice.]

THE PEOPLE OF THE STATE OF NEW-YORK vs. GEO. CLARKE.

Under sections 808 and 809 of the code, *the people* are liable to be charged with an extra allowance for costs in actions brought by them.

An action brought by the attorney general, in the name of the people, in pursuance of the joint resolution of the legislature passed on the 31st of March and the 10th of April, 1848, for the purpose of testing the validity of the titles of certain landlords to lands mentioned in said resolution, is one of those in which the code permits an extra allowance to be made.

MOTION by the defendant, for an extra allowance for costs, after a demurrer to the complaint had been allowed. The facts are detailed in the opinion of the court.

John Van Buren, for the plaintiffs.

N. Hill Jun. and *S. Beardsley*, for the defendant.

WILLARD, J. At the opening of the legislature in January, 1848, Governor Young called their attention to what he denominated the "*manor excitement*." He observed, among other things, that one of the sources of disquietude among the tenants, was the apprehension that the landlords have no title to the

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lands, and that after paying rents and making improvements for a long series of years, they may in virtue of a superior title, be ejected from their possessions. He adverted to the rule of law which now exists, that a tenant can not dispute the title under which he holds, and to the applications which had been made to the legislature for a law requiring the landlord, in actions to be brought by him against his tenants, to prove that he had a good paper title to the land at the time the lease under which the tenant holds was executed. He then proceeded as follows: "In actions to be brought by the state involving the title to lands, the obstacles that are thrown in the way of private persons in its investigation, would not be encountered; and the adjudication would be entirely conclusive, and should, and it is believed would be, entirely satisfactory to the tenants. If an action or actions of ejectment shall be brought by the state, in such case or cases as you may in your wisdom prescribe, and be fairly tried, the state will have discharged a duty which, in my judgment, it owes to the importance of the subject and to the interest as well of the landlords as of those holding under them in the character of tenants and purchasers. It is difficult to understand why the most sensitive holders of large tracts of land should feel any alarm at the prospect of such action, on the part of the government. The confirmation of their titles can not fail to render essential service, in allaying irritation and disquietude, and hence increasing the value and productiveness of their lands; and I am quite sure it will not be supposed that the state will engage in such an enterprise for the purpose of enriching itself." He then adverted to the uniform practice of the government in regard to escheats, as furnishing a sure guaranty of her justice and magnanimity; and remarked that if it should be found that the legal title to any of the lands for the recovery of which any such prosecution shall be instituted, shall be in the state, she will cheerfully release the same to such claimants as may be equitably entitled to the lands. (*Assembly Doc. 3, p. 23, 24, for 1848.*)

The subject thus brought to their notice was referred by the legislature to a select committee on landlord and tenant, the majority of whom, at a subsequent day, reported a concurrent

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resolution instructing the attorney general, among other things, to inquire whether in his judgment the state may justly and legally lay claim to the title of land claimed by the present landlords, by escheat or otherwise; and if, in his opinion, the title of the present claimants may be justly questioned, and the right of the state to such lands, or to any part thereof, be established according to law, that he take measures, either by suit at law or other proceedings, as will test the validity of such titles or claims. (*Assembly Doc.* 125.) This resolution was adopted by the assembly on the 31st of March, 1848, (*Assembly Jour.* pp. 1011, 1015,) and concurred in by the senate on the 10th of April of the same year. (*Senate Jour.* of 1848, pp. 572, 573.)

In pursuance of the foregoing resolution, the late attorney general, on the 1st November, 1849, commenced the present action, to vacate letters patent granted by George the 2d, on the 19th of November, 1737, to William Corry and his associates. The patent conveyed to the patentees in fee, 25,700 acres of land in the now county of Montgomery. The one-half of the patent having already been recovered by the state; the other half, claimed to belong to the defendant, a descendant of Lieut. Gov. Clarke, was sought to be recovered in this action.

The complaint was framed under the 438d section of the code of 1849, and the grounds on which it asks to annul the said patent are, the alledged fraudulent suggestions and misrepresentations contained in the petition on which it was granted, and the fraudulent concealment of certain facts therein mentioned. The cause was finally put at issue in October, 1850, on demurrer to the defendant's amended answer, and was argued at the Montgomery special term in February last, before Mr. Justice Cady. At a subsequent day, the learned judge, in an elaborate opinion, gave judgment for the defendant. (a)

At the Montgomery special term in June last, a motion was made by the defendant's counsel, founded on an affidavit and notice of a motion to the attorney general, and on the pleadings in the cause, for an extra allowance under §§ 308 and 309 of the code. In that affidavit it is shown, that the defendant as devisee

(a) See 10 *Bart.* 120, *S. C.*

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of his father, owns more than 12,000 acres of land in the county of Montgomery included in the patent sought to be vacated, and that the value of his estate therein exceeds \$150,000; and that the legal principles and questions involved in the action, affect his title to other large tracts of land in the state, owned by him. It is also stated in the said affidavit, that in the preparation of his defense, and as counsel fees in this action, he has already expended above \$1100, and that this sum does not include the compensation of one of his counsel, to whom nothing has yet been paid.

The facts contained in the defendant's affidavit are not controverted; but the claim to an extra allowance is resisted upon two grounds: 1. That the people not being named in the sections of the code under consideration, are not liable to be charged with an extra allowance; and 2. That this action is not one of those in which the code permits an extra allowance to be made.

I. Are the people liable to be charged with an extra allowance under §§ 308, 309?

The tenth title of part two of the code treats of the costs in civil actions. After regulating the costs, in ordinary actions between party and party, when one party or the other is entitled to recover them as of course; and providing for cases where costs rest in the discretion of the court; and for extra allowances, beyond the regular costs, which are to be adjusted on notice, by the clerk, it proceeds in the 319th section as follows: "In all civil actions prosecuted in the name of the people of this state, by an officer duly authorized for that purpose, the people shall be liable for costs, in the same cases and to the same extent as private parties. If a private person be joined with the people as plaintiff, he shall be liable in the first instance for the defendant's costs; which shall not be recovered of the people, till after execution executed therefor against such private party and returned unsatisfied." The 319th section of the code was copied, without essential alteration, from 2 R. S. 619, § 38. As no private person was united with the people as plaintiffs, the people alone were liable to costs on failing in their action, to the same extent as private parties. This is the express language of the

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act, and it is difficult to conceive of any form of words by which it could be more plainly expressed.

II. The next inquiry is, whether this action be one in which the code permits an extra allowance to be made.

By the 308th section, such allowance is admissible in an *action* for the recovery of money, or of *real* or personal property, if a *trial* has been had, and the case be difficult or extraordinary.

(1.) Was this a civil action? By the 1st section of the code an action is defined to be an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. Actions are of two kinds; civil and criminal. A criminal action is prosecuted by the people of the state, as a party, against a party charged with a public offense, for the punishment thereof; every other is a civil action. (*Code*, §§ 2-6.) As the defendant is not pursued in this case for a public offense, the action is necessarily a civil action. Indeed, the 433d section, under which this action is brought, calls it an action, in terms.

(2.) Has there been a trial? By the 252d section, a *trial* is defined to be the judicial examination of the issues between the parties, whether they be issues of law or fact. When the demurrer in this case was argued at the February special term, it was, according to the language of the code, brought to *trial*.

(3.) Was this action brought for the recovery of *land*, within the meaning of the code? This can be best tested by a reference to what would have been the result, if the plaintiffs had prevailed. According to the revised statutes, (2 R. S. 580, §§ 24, 25,) had judgment been rendered in favor of the plaintiffs, on the demurrer, or upon a verdict, a copy of the record was required to be filed in the office of the secretary of state, and an entry thereof to be made in the records of the commissioners of the land office, of the substance and effect of such recovery, and of the time when the record thereof was docketed. Such record and entry would have been conclusive evidence of the title of the plaintiffs to the land; and the 25th section author-

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ized the commissioners of the land office to dispose of it, in the same manner as if such letters patent had never been issued. The avowed object of the action, so far as can be gathered from the recommendation of the governor and the joint resolution of the legislature, was to take away the title of the defendant and establish that of the plaintiffs; such would have been the consequence had the plaintiff obtained judgment on the demurrer.

The right to costs does not depend on the *form* of the prayer for relief in the complaint. We must look at the *substance* of the thing, rather than the *shadow*. If the relief prayed for had been granted, the plaintiffs would have recovered the land, and the defendant been left a naked trespasser without title. The plaintiffs, too, would have been entitled to costs, and to an extra allowance in the discretion of the court. That the plaintiff, on failing to recover, should be liable to costs and an extra allowance, in the same manner, is called for by the principles of a just reciprocity. It would be an impeachment of the fairness and good faith of the executive and legislature, to suppose them willing to subject the defendant to a hazard on the score of costs, which they were afraid to encounter on the part of the plaintiffs. In former times, the people screened themselves from costs, by taking shelter under the prerogative of the crown. That shelter was wisely removed by the revised statutes, and the people now meet their antagonists on equal terms. It must be presumed that the legislature, when they ordered this action to be brought, were aware of the consequences of failure. When they adopted the code, they meant to subject the people to its provisions, as well as individuals. (*Code*, § 319.)

Again: by the code, (§ 69,) all *forms* of action are abolished, and instead thereof, but one form of action for the enforcement and protection of private rights and the redress of private wrongs, is recognized, and that is denominated a *civil action*. There is now no such action by name, in the code, as an *ejectment*, writ of right, &c. or any other of the ancient actions for the recovery of land. The 308th section of the code must relate to any action, known to the code, by virtue of which the people, or any other party, can recover a title to real property,

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The present action is precisely of that character. It is expressly recognized by § 438 of the code, and it has been shown to be for the recovery of real estate. This vacating the patent, is merely the removing an obstruction to the plaintiff's recovery of the land. The latter is the main object. It is analagous to an action by the heir, claiming that the will of his ancestor by which he is disinherited, is void for a want of capacity to make it, or for fraud, or the like. Can it be said that such action is not for the recovery of real estate, because the will must first be annulled, before a recovery can be had?

(4.) Was this case *difficult* or *extraordinary*, within the meaning of the code? This has not been denied. It was both difficult and extraordinary. It was a case not within the range of common professional experience and research. It justified, if it did not require, on the part of the defendant, a consultation with the wisest and most experienced counsel in the state. It, therefore, involved the necessity for large disbursements for legal assistance.

The 309th section points out the mode in which the additional allowance, beyond taxable costs, shall be computed. If the plaintiff recover judgment it shall be upon the amount of money, or the value of the property recovered, or claimed, &c. &c. 2d. If the defendant recover judgment, it shall be upon the amount of money, or *the value of the property claimed by the plaintiff*, &c. &c. Such amount of value must be determined by the jury, *court* or referee, by whom the action is tried, or judgment rendered, &c. It is not required that the value of the property should be determined by the same *judge* who tried the cause, but by the *court* by whom it was tried. The *court*, though held by another judge, is as competent to determine this question, as the judge who presided at the trial. It is determined merely by an inspection of the pleadings, or the reading of an affidavit.

Nothing remains but to determine the amount of the additional allowance proper to be made to the defendant. The 303d section of the code, which abrogates the former fee bill, substitutes certain sums, which are specifically mentioned in subse-

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quent sections, to be allowed to the prevailing party by way of *indemnity* for his expenses in the action. These are to be adjusted by the clerk on the application of the prevailing party, and a notice to the party to be charged, and are to be inserted in the entry of the judgment. It was foreseen by the legislature that these allowances would not always amount to an *indemnity*, and therefore it was provided by the 308th section, that, in addition to these allowances, if the action be for the recovery of money, or of real or personal property, and a trial has been had, the court may, in difficult or extraordinary cases, make an allowance of not more than ten per cent on the recovery or claim, as in the next section prescribed, for any amount not exceeding five hundred dollars ; and not more than five per cent for any additional amount. The like allowance is permitted in partition and mortgage foreclosure cases, in attachment cases, proceedings for the construction of a will, or to compel the determination of claims to real property, and also in any case where the prosecution or defense has been unreasonably or unfairly conducted. It is evident that the legislature intended, in the cases within the section, that the prevailing party should be *indemnified* to the extent permitted to be allowed, for all his expenses which were reasonably necessary in the prosecution or defense of the action. The latter clause of the section obviously provides for an allowance by way of *punishment*, irrespective of indemnity ; for it is clear that an action, neither difficult or extraordinary, may be so unfairly and unreasonably conducted, as to deserve something more than the mere censure of the court. The extent to which an allowance could be made in this case, is seven thousand five hundred and twenty-five dollars. A much smaller sum will in the present case indemnify the defendant. The action was brought, as the result has proved, without any just foundation, and has been shown by Judge Cady, by whom it was decided, to be bereft of every semblance of merits. With the correctness of that decision we have nothing to do on the present motion. It is, until reversed, the law of the land, and entitles the defendant to move for the relief he now seeks. Nor should the court be deterred from

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the exercise of its power, by the apprehension that the present decision will form a precedent for the defendants, in the other "manor suits," who have already prevailed, or may hereafter obtain judgment against the people. If these numerous actions shall lead to a heavy expenditure of the public money, the responsibility must be borne by the executive who recommended, and the legislature who directed the actions to be brought. The people of this state are surely too magnanimous to shrink from reimbursing a citizen, whom their public servants have unjustly vexed.

The additional allowance in this case should be enough to indemnify the defendant for the sums he has paid for counsel fees, and it is accordingly ordered that eleven hundred dollars be allowed. This amount, in case the people are liable at all, has not been contested.

[MONTGOMERY SPECIAL TERM, June 26, 1851. *Willard*, Justice.]

WHEELER vs. SMITH.

S., a constable, having in his hands an execution against the property of M., levied on a horse, and advertised it for sale. Prior to the day of sale, an attachment came to his hands, against the property of M., by virtue of which he attached the same horse. The property was then sold on the first execution, and a sufficient sum was raised to pay the first execution, and leave a surplus to pay the amount due in the attachment suit. After the sale of the horse, judgment was obtained in the attachment suit, and execution issued thereon to S., who levied on the same money which he had received on the sale of the horse. He sold such money, and applied the avails to satisfy the execution. *Held* that the lien of the attachment, on the horse, by operation of law became transferred, after the sale, to the surplus money in the hands of S.

Held also, that such surplus money in the hands of S. was the money of M., and was liable to levy and sale on the subsequent execution against M. which came to the hands of S.

THIS cause originated in a justice's court in Delaware county, where the plaintiff recovered. It was taken by appeal to the

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county court, but. the county judge being related to one of the parties, it was transferred to this court.

The defendant was a constable, and having in his hands an execution against the property of one Murphy, he levied on a horse, and advertised it for sale. Prior to the day of sale an attachment came to his hands against the property of Murphy, by virtue of which he attached the same horse. The property was then sold on the first execution, and sufficient was raised to pay the first execution, and leave a surplus to pay the amount due in the attachment suit. After the sale of the horse, judgment was obtained in the attachment suit and execution issued thereon, and the same was placed in the hands of the defendant, who thereupon levied on the same identical money which he had received on the sale of the horse; which money he sold, and applied the avails thereof to satisfy the said execution. Subsequently, the plaintiff took an assignment from Murphy, of his claim for the surplus money raised on the sale of the horse after paying the first execution, and brought this action against the constable to recover it; claiming, that the lien of the attachment on the horse was lost, by virtue of the sale on the first execution, and that the surplus in the hands of the constable could not be levied on, by virtue of the execution issued on the judgment obtained in the attachment suit.

Wm. Yeomans, jr. for the appellant.

T. H. Wheeler, for the respondent.

By the Court, SHANKLAND J. The facts of this case, as well as the finding of the justice, preclude the plaintiff from contending that the horse sold on the process against Murphy was exempt from sale, by virtue of the exemption laws of this state. There remain two questions in the cause. First, whether the attachment, in favor of Millard and others against Murphy, and which was levied on the horse before his sale, on the Cornsack execution, was a lien after such sale, on the moneys received for the horse: and second, whether the surplus money,

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raised by the constable, by a sale of Murphy's property on other process could be levied on, or retained by him to satisfy other executions which came to his hands after the sale, and while the money was yet in his hands.

The attachment was a lien upon the horse before and at the time he was sold on the prior executions in the same constable's hands, and when he was turned into money by that sale, it seems but reasonable that the surplus money should be held subject to the same condition that the horse was. If the constable had delayed the sale of the horse until judgment had been obtained on the attachment, and execution had issued thereon, and a levy been made upon the horse, no doubt could have been entertained. This surplus, or enough of it to satisfy the execution, could have been applied to it. But the sale on the prior execution in this same constable's hands was a matter of legal necessity. He could not return them as unsatisfied, for want of sufficient property, and get them renewed. And when the execution in the attachment suit came to his hands, how could he have justified a return of nulla bona?

I am of opinion, that the lien of the attachment on the horse, by operation of law became transferred to the surplus money in the constable's hands, and that it was properly sold on the execution. This conclusion, on the first inquiry above proposed, will compel the reversal of the justice's judgment, without examining the second question. But I propose to examine that also.

The legislature have declared (2 R. S. 366, § 19,) that upon an execution against the property of a defendant the officer may levy upon and sell any bills or other evidences of debt, issued by any moneyed corporation, *which shall belong to the defendant in the execution*. None of the decided cases, cited by counsel, have reached the question raised in this. (4 *Ad. & E.* 399. 1 *Cranch*, 117. 6 *Cowen*, 494. 5 *John*. 163. 3 *Scam.* 451. 1 *Murph.* 47. 3 *Humph.* 437. 4 *Bibb*, 311. 17 *Pick.* 462.) They were cases, where the money levied on was raised by the sale of property of third persons, or had been received by officers on executions against third persons, and had never been

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received by the creditor so as to have become his money, and therefore an execution against him could not reach it, *because it was not his money*. But in this case the money was raised on execution, on the sale of the property of Murphy, and the question is, was not the surplus money, the money of Murphy? If it was not Murphy's, I would like to know whose it was.

It clearly did not belong to the constable, and it was his duty to return it to Murphy, if there was no other process in his hands to justify its detention. If this money had been collected on execution in favor of Murphy against a third person, it may be said not to become his *specific* money until he has obtained possession of it; although the court have sustained that position by very feeble and unsatisfactory reasoning; but when, as in this case, his horse is, by the process of law turned into money, there seems no good reason for saying that the surplus is not his property. The policy of the law, at the present time, is to provide facilities for reaching the property of debtors, in the most direct and least expensive way, while at the same time it grants to them the most liberal exemptions. As an instance, the 293d section of the code allows any one indebted to a judgment debtor, after execution issued against him, to pay the amount of his debt to the officer having the execution, and the receipt of the officer is a full discharge of the debt. Under this section the case in 6 *Coven's Reports* is provided for, and probably all cases where sheriffs have collected money of third persons in favor of a judgment debtor.

In *Crane v. Freese*, (1 *Harr.* 305,) it was held that money, whether in specie or in bank notes, may be taken on execution, if found in the possession of the defendant, or if capable of being identified as his property. And in *Tucker v. Atkinson*, (1 *Humph.* 300,) it was held that surplus money in the hands of a sheriff may be attached. In *Williams v. Rogers* (5 *John.* 163,) the supreme court would probably have granted the application on the ground that the money could have been levied upon, had it not been for the rights of Coates intervening. The court say, "If the claims of Coates were out of the question, it would be unreasonable to require the sheriff to pay the overplus moneys

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into the hands of the defendant, when he held in his possession a subsequent execution against the property of the defendant, and had no means of satisfying it, but out of these very moneys. In such a case, the court would probably be disposed to adopt the reasoning of the supreme court of the United States in the case of *Turner v. Fendal*, that the money may be levied on."

It should be observed that the case of *Williams v. Rogers*, like that of *Turner v. Atkinson*, above cited, was where a *surplus had been raised on an execution against the same defendant*, and in this respect is like the case under consideration.

I am of opinion, that the surplus money in the hands of the constable was the money of Murphy, within the true intent and meaning of our statute, and was liable to levy and sale on the subsequent execution against said Murphy, which came to the hands of the officer; and that for this reason also, the justice's judgment should be reversed with costs. The costs must be the same as if decided by the county court.

Judgment accordingly.

[OTSEGO GENERAL TERM, July 1, 1851. *Mason, Munson and Shankland*, Justices.]

LAWTON vs. SAGER and others.

A deed can only be delivered as an *escrow*, to a third person. If it be intended that it shall not take effect until some subsequent condition shall be performed, or some event shall happen, such condition must be inserted in the deed itself; or else it must not be delivered to the grantee.

Whether a deed has been delivered or not is a question of fact, upon which parol evidence is admissible. But whether a deed, when delivered, shall take effect absolutely, or only upon the performance of some condition not expressed therein, can not be determined by parol evidence.

Where a deed, absolute upon its face, is delivered to the grantee, it takes effect at once. It can not be delivered to take effect upon the happening of a future contingency; for this would be inconsistent with the terms of the instrument itself.

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Unsuccessful claimants of surplus moneys arising from a mortgage sale, will be charged with the extra costs occasioned by their claims, where the claim of the successful party is just and equitable, and the amount of the surplus is small, and a large amount of unnecessary costs has been incurred in the litigation of the claims.

THIS case was heard upon exceptions to the report of a referee to whom it had been referred, to ascertain the priorities of the several claims to the surplus moneys arising from the sale of the mortgaged premises in this cause, and who were entitled to such surplus moneys. The surplus moneys amounted to \$315.61. The referee reported that John W. Hallenbeck was entitled to \$122 of that sum—that Casper P. Collier was entitled to \$106.78, and that the balance of the surplus, amounting to \$86.83, belonged to Darius Howland. The claimant Howland excepted to the report, on the ground that he had a prior right to all the surplus moneys.

It appeared from the evidence taken by the referee, that the mortgaged premises which produced the surplus in question, were sold on the 8th of April, 1848; that on the 14th of January preceding, Sager, the mortgagor and owner of the premises, had executed a conveyance of the same to Howland, in trust for his creditors. The deed was acknowledged and recorded on the 17th of January, 1848. On the 3d of February, 1848, the claimant, Hallenbeck, recovered a judgment against Sager for \$101.37, which was docketed in the Greene county clerk's office, in which county the mortgaged premises were situated. On the 17th of February, 1848, the claimant Collier recovered a judgment by confession against Sager for \$150 of debt, and \$8.71 costs, which judgment was also docketed in the Greene county clerk's office.

It was insisted before the referee, that the deed of assignment was delivered *conditionally*; that it was agreed between Sager and Howland, at the time of the delivery, that the latter should procure certain creditors who had commenced proceedings against Sager as an absconding debtor, to discontinue those proceedings, and come in with other creditors under the assignment, and that upon his failure to effect this arrangement, he was to

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return the assignment to Sager. Upon this question a large amount of testimony was taken before the referee. The referee decided, upon the evidence before him, that the deed of assignment was delivered conditionally, and that the condition had not been performed. Upon this ground he held that the creditors of Sager who had obtained judgments subsequent to the execution of the assignment, were entitled to priority.

A. Greene, for the claimant Howland.

C. P. Collier, for the claimants Hollenbeck and Collier.

HARRIS, J. The deed of assignment is valid upon its face, and absolute. That it was duly executed by Sager, is not denied; nor is it denied that it was delivered to Howland, the grantee. The only question of fact in the case is, whether such delivery was absolute or conditional. From a hasty examination of the mass of testimony in the case, I am inclined to think the referee has erred in his conclusion upon this question; but whether he has or not, I do not deem it necessary to decide.

A deed can only be delivered as an *escrow* to a third person. If it be intended that it shall not take effect until some subsequent condition shall be performed, or some subsequent event shall happen, such condition must be inserted in the deed itself, or else it must not be delivered to the grantee. Whether a deed has been delivered or not, is a question of fact upon which, from the very nature of the case, parol evidence is admissible. But whether a deed, when delivered, shall take effect absolutely, or only upon the performance of some condition not expressed therein, can not be determined by parol evidence. To allow a deed, absolute upon its face, to be avoided by such evidence, would be a dangerous violation of a cardinal rule of evidence. (*Gilbert v. The North American Fire Insurance Company*, 23 Wend. 43. *Ward v. Lewis*, 4 Pick. 518. 4 *Kent's Com.* 454. *Jackson v. Catlin*, 2 John. 248, per *Platt, arguendo*.) The deed in this case being absolute upon its face, and having been delivered to the grantee himself, took effect at once. It

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could not have been delivered to take effect upon the happening of a future contingency, for this would be inconsistent with the terms of the instrument itself. Without regard, therefore, to any understanding which may have existed between the parties at the time the deed was delivered, it must be held to be an absolute conveyance, operative from that time. The second, third and fourth exceptions must therefore be allowed, and an order must be entered declaring the claimant Howland entitled to the whole of the surplus moneys in question.

The first and fifth exceptions must be disallowed. The matters to which they relate are not the proper subjects of exception.

The order to be entered upon this decision must also direct that the claimants Hallenbeck and Collier, who have failed to establish their claims to the surplus moneys or any part thereof, be charged with the extra costs, to which the claimant Howland has been subjected by reason of their claims. The claim of Howland was just and equitable. The amount of the surplus is small. At the best, it will make but an insignificant dividend for the creditors of Sager, among whom it is to be distributed. Without adverting to the character of the claims of the unsuccessful parties, it is enough to say that they have entirely failed to establish their claims, and that a large amount of unnecessary costs has been incurred in their litigation. Under these circumstances I do not feel at liberty to charge these costs upon the fund in question. The parties who have failed ought not to complain if they are made to bear the usual consequences of defeat. The amount of such extra costs is to be determined by some proper officer upon the usual notice of taxation.

[ALBANY SPECIAL TERM, July 7, 1851. *Harris*, Justice.]

In the matter of the petition of MARIA STAFFORD.

Where a trustee deposits the funds of the trust estate in a bank, in his own name individually, and not as trustee, and with his own private funds, he thereby becomes the debtor of the estate, and the creditor of the bank; and in case the trust funds are lost, through the insolvency of the bank, the loss will fall upon the trustee.

It is a well settled principle of equity, that trust funds are to be kept separate from the private funds of the trustee; and if mingled with his own, he may be charged with such funds, as being himself the borrower.

On the 20th of March, 1851, an order was made appointing Gilbert L. Wilson, Esq., a referee in this matter, with directions to inquire and report in relation to certain matters, and, among other things, to take and pass the accounts of Albert D. Robinson, as master and receiver of the estate of the late James Gibbons, deceased, the husband, in his lifetime, of Esther Gibbons.

In pursuance of this order the referee reported, on the 11th of August, 1851, that he had stated the accounts mentioned in the order, and that the balance remaining in the hands of the master and receiver, was \$320,86. Upon the accounting, Mr. Robinson claimed to be allowed the sum of \$265,73, for money of the estate deposited by him in the Canal Bank of Albany, and lost through the insolvency of the bank. It appeared that he had deposited the funds of the estate in that bank, in his own name individually, and not as master or receiver, and with his own individual funds—that when the bank failed, there was a balance in the bank standing to the credit of Mr. Robinson to the amount of \$497,68, of which, \$369,65, belonged to the estate, and \$128,03, to him individually—that since the failure of the bank he had received a dividend of \$74,65, which he had credited to the estate. He also consented to be charged with a further dividend of \$29,52. The counsel for the committee insisted that the master and receiver should not be credited with this item, and also objected to the allowance of \$57, charged for drawing and engrossing the final report of the master and receiver. Both these items were al-

In the matter of Stafford.

lowed by the referee, and to so much of the report the counsel for the committee excepted.

J Lansing, for the committee.

A. D. Robinson, in person.

HARRIS, J. When a bank receives from its customer his money, and passes the same to his credit, it is called a deposit, but, in legal effect, it is a loan. The bank credits the amount to the depositor, as a debt which it owes him. Nothing short of payment will absolve the bank from the obligation it assumes. (*Commercial Bank of Albany v. Hughes*, 17 Wend. 94.) Robinson, therefore, must be regarded as having loaned the money in question to the bank. If he had made the deposit to the credit of the estate, then probably, the loss sustained through the insolvency of the bank, would have fallen upon the estate, and not upon him. But, by depositing the funds of the estate with his own individual funds, to his own credit individually, I think he became the debtor of the estate, and the creditor of the bank, to the amount so deposited. It was, in effect, a loan, not as receiver, but on his own individual account. Had he owed the bank, it might have insisted upon an offset of the debt against the deposit, nor would it have availed the receiver to show that the funds deposited were really not his own, but those of the estate. (*Utica Ins. Co. v. Lynch*, 11 Paige, 520.)

The question, in this case, is to be determined upon the same principles as other cases of trust. The receiver was, in fact, a trustee, and is entitled to the same protection, and subject to the same liabilities as other trustees. I understand it to be a general rule, applicable to all persons standing in that relation, whether they be receivers, guardians, executors or administrators, or trustees of any other description, that so long as they keep themselves strictly within the line of duty, and exercise reasonable care and diligence, they can not be made responsible for any loss or depreciation of the fund intrusted to them; but if they do not strictly pursue that line, and a loss ensue, they

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are liable to make that loss good, although such loss may have been wholly unexpected, and little likely to have happened from the course pursued, and although the conduct of the trustee had been entirely free from any improper motive. If this rule be applicable to the case in hand, and I am unable to see why it is not, it is clear the receiver must himself bear the loss which he seeks to charge upon the estate. Instead of depositing the funds to the credit of the estate, separately, he mingled them with his own, and involved them in a general account of debtor and creditor between himself and the bank. It may be assumed that he was actuated by no improper motive. He did not suppose it possible that any one could be injured by thus disposing of the funds. The same would have been equally true, had he loaned them temporarily to a friend, in whose honesty and responsibility he had confidence. Yet it would not be pretended that, in such a case, he could escape liability for any loss which might occur, though equally unexpected, as in this case. He would have been liable in that case, as he is in this, upon the ground that in the management of the funds he had allowed himself to pass beyond the line of his duty.

I regret to find myself brought to this conclusion. There can be no doubt that Mr. Robinson has acted in entire good faith; nor is there any reason to believe that the estate has really suffered by the course he has pursued. It seems severe, under such circumstances, to charge him with the loss. But, though it operate severely in this particular instance, is it not better, than that a well settled and salutary principle should be violated? Courts of equity have laid down certain rules as the result of long experience, by which those having the management of trust funds are to be guided, if they would protect themselves from personal responsibility. Prominent among them is the principle that such funds are to be kept separate from the private funds of the trustee, and, if mingled with his own, he may be charged with such funds, as being himself the borrower.

This exception to the report must, therefore, be allowed, and there must be added to the amount reported by the referee to be due from Mr. Robinson, the sum of \$265,78, being the net

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amount of the credit allowed to him by the referee on account of the Canal Bank deposit.

In respect to the item of \$57, there are no facts before me from which I am able to determine whether that amount was or was not properly allowed by the master. That exception must, therefore, be disallowed. The report, amended as above, must be confirmed.

[ALBANY SPECIAL TERM, July 7, 1851. *Harris*, Justice.]

CONGER vs. RING, executor, &c.

The rule that a trustee, or person standing in a situation of trust and confidence, shall not purchase or deal with the subject of the trust, for his own benefit, is absolute and universal, and subject to no qualifications or exceptions.

Where an executor, with power to sell under the will, or whose duty it is to exert that power with the aid of a surrogate's order, upon becoming aware of the insufficiency of the personal assets, purchases the trust property, at a sale under a mortgage or other incumbrance, for less than its value, he must take it for the benefit of those for whom he is bound to act; provided they assert their rights within a reasonable time.

And where the personal estate of the testator is insufficient to pay his debts, and there is no other real estate, the mortgaged premises thus purchased by the executor will, upon the application of creditors of the testator, be *resold*.

The sole purpose of directions in a decree for the sale of mortgaged premises, authorizing any party to the suit to become a purchaser, is to avoid the effect of a supposed technical rule that a party to a suit can not become a purchaser under the decree, without special leave; not to authorize him to purchase and hold contrary to equity.

THIS was an appeal by the plaintiff from a judgment entered at a special term, by a justice of this court, upon a special verdict. The action was brought against the defendant, as executor of Tobias Stoutenburgh, to recover the amount of a promissory note made by the testator, for \$275,61, payable to one Schultz, or bearer, and of which the plaintiff had become the owner. The

11 356
59h 287
11b 356
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complaint alleged that the testator died in 1846, leaving some personal estate, and 186 acres of land in Clinton, Dutchess county, of the value of at least \$4000, but mortgaged to one John Drury for about \$850; that the defendant's testator made his will in March, 1845, appointing his wife and the defendant executors; that the widow renounced, and letters testamentary were granted to the defendant; that the testator left six children, one of whom was the wife of the defendant; that the will directed the real and personal estate to be sold within one year after the testator's decease, but if the wife survived then within one year after her death, and directed as to the distribution of the proceeds of the sale; that the real and personal estate greatly exceeded the debts; that the defendant fraudulently procured the Drury mortgage to be assigned to A. Wager, his attorney, who immediately foreclosed it in chancery; that at the sale under the decree of foreclosure the defendant was the only bidder, and became the purchaser, for \$1100, and received a deed from the master; that the parties in interest believed he purchased in his representative capacity, he creating that belief by saying, prior to the sale, that he would see the property brought its fair value; that after the sale Schultz insisted on the payment of his debt, remarking on the gross discrepancy between the price and the value, and saying that he would give \$4000 for the farm; that the defendant, in reply, told Schultz the sum bid was of no consequence as, had he bid the full value the surplus would have lain idle, and he promised to pay the note; that Schultz relied on such promise, until after a final accounting by the defendant, before the surrogate, and the surrogate's decree thereon, made in May, 1848, when the defendant refused to pay him any more than \$46,50, his dividend under the decree, which Schultz refused to accept; that the estate was more than sufficient to pay the debts, if properly applied. The plaintiff insisted that the defendant should be regarded as a trustee; that his promise to pay Schultz was valid, and an acknowledgment that the defendant bought as trustee; and the complaint demanded judgment for the amount of the note with interest, or that the real estate, or so much as should be necessary,

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might be sold, under the direction of the court, to pay the plaintiff's demand and the costs.

The defendant, by his answer, insisted that he was no longer executor; that on the 29th of May, 1848, he was discharged from all further liability as executor, by the surrogate, on a final accounting before him; that Schultz was cited to appear before the surrogate. The answer also alledged that the real estate was not worth over \$2500; that the will was so defective as to render it incapable of being executed; that the debts exceeded the sum of \$1744, and the personal estate was worth about \$400. The defendant denied all fraud or bad faith, in the execution of his trusts; and alledged that a short time after the decease of the testator he ascertained that the personal estate was insufficient to pay the debts, and that it would be necessary to sell the real estate, but found that the will was so defective that a perfect title could not be given to the purchaser under it, (the widow of the testator being still living,) and that in consequence it would not sell to advantage. He denied connivance with Wager to purchase the Drury mortgage, but admitted talking to him on the subject; he also denied that Wager was his attorney previous to the accounting; and alledged that the widow and heirs assented to the foreclosure; that the decree authorized the parties to purchase; that the defendant had not assets to pay the mortgage; that he purchased on his own account; he denied the offer by Schultz to give \$4000 for the farm, or any promise by him, the defendant, to pay the note. He insisted that there was not sufficient real and personal estate to pay the debts of the testator; that the note was transferred to make Schultz a witness; that the defendant had improved the premises, and laid out \$1500 thereon; that the decree of the court of chancery was final, and could not be questioned here; that the decree of the surrogate was binding upon Schultz, and the plaintiff; that if any promise was made to Schultz, by the defendant, to pay the note, it was void, for not being in writing; that the estate was now indebted to the defendant in the sum of \$1195,70, after deducting his dividend, &c.

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The plaintiff put in a replication denying all the material allegations in the answer.

The cause was tried at the circuit in Dutchess county in October, 1849. The jury found a special verdict containing the facts appearing in evidence; and upon that verdict judgment was rendered for the plaintiff.

H. Swift and J. Armstrong, for the plaintiff.

J. Thomson and J. C. McCarty, for the defendant.

By the Court, BROWN, J. Tobias Stoutenburgh, the defendant's testator, died in June, 1846, seised of a farm in the town of Clinton in the county of Dutchess, containing 185 acres, of the value of \$2500, charged with the payment of a mortgage to John Drury to secure \$850. He left a will and appointed the defendant his executor, which will was admitted to probate on the 6th July, 1846, and letters thereon issued to the defendant. The executor was directed to sell and dispose of the real and personal estate within one year after the testator's death, and after the payment of his debts and funeral expenses, the proceeds were to be distributed to certain legatees in the will named. By a subsequent clause he gave to his wife Catherine the use of the real property during life, so that the power to sell could not be executed until after her death. Drury, the mortgagee, assigned the mortgage to Ambrose Wager, who filed his bill of foreclosure against the widow and heirs at law of the testator. To this proceeding the defendant and his wife—she being an heir—were made parties. A decree was obtained on the 28th of October, under which the farm was sold by a master for the sum of \$1100, and the defendant became the purchaser. He immediately entered into the possession under the deed, where he still remains. The decree contained the usual clause authorizing either of the parties to purchase at the sale. The personal estate proved insufficient to pay the debts, as appears by a decree of the surrogate of the county of Dutchess upon a final settlement of the accounts of the defendant as executor, made on

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the 24th of May, 1848. The plaintiff is one of the principal creditors, and he claims that the farm may be resold and the proceeds applied to the payment of the debts.

If the relation which the defendant maintained towards the creditors of the estate of his testator were such that he could not purchase for his own benefit, the authority given in the decree, that either of the parties might purchase, can not take away their right to a resale. They were not parties to the foreclosure suit. The existence of simple contract debts due by the testator, the insufficiency of the personal estate to pay them, and the defendant's relation to the estate as the executor, were facts not revealed to the court; and any directions given in the decree with regard to the manner in which the sale should be conducted, or who might buy or be concluded by it, can not affect the executors. Besides; the sole purpose of such directions is only to avoid the effect of a supposed technical rule that a party to a suit can not become a purchaser under the decree without special permission, and not to authorize him to purchase and hold contrary to equity. (*Torry v. The Bank of Orleans*, 9 Paige, 649.)

Nor is the surrogate's decree for the final settlement of the executor's accounts a bar to the plaintiff's action. The proceedings were taken under § 52 or § 70 of the act in regard to "the duties of executors and administrators in rendering an account," &c. (2 R. S. 32 and 35,) and related exclusively to the receipts and disbursements of the executor, and to the charges and allowances to and against him in the administration of the personal estate. The 65th section of the same act declares that such final settlement shall be conclusive evidence of the following facts and no others. 1. That the charges for money paid, and for necessary expenses, are correct. 2. That the executor or administrator has been charged with all the interest for moneys received by him, and for which he is accountable. 3. That the moneys stated in the account as collected, are all that were collectable, on the debts stated in the account, at the time of the settlement. 4. That the allowances in such account for decrease, and the charges for increase in the value of the assets, were correctly made. It is quite manifest that the surrogate's

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decree has no possible connection with the subject of the present action, except so far as it establishes the amount realized from the personal assets, and puts the plaintiff in a condition to proceed against the lands descended.

The defendant Ring, was intrusted with the power to sell the farm in question, and apply the proceeds to the payment of the debts and legacies. He was under no manner of obligation to take upon himself the burthen of executing the will. If he meant to pursue his own personal interests, and not those of the creditors and legatees, he had perfect liberty to do so. But when he had proved the will and obtained the letters, and assumed the burthen of the administration, that liberty was no longer his. What he might deem to be his own interests, instantly became subordinate to those of others; for with his new character and position as executor, came duties and obligations which the law will not suffer him to avoid or disregard. After he had filed his inventory and discovered that the personal property was insufficient to pay the debts, he then became a trustee for the creditors, in respect to the real estate, and it was made his duty by § 1 of the act concerning "the powers and duties of executors and administrators, in relation to the real estate of their testator or intestate," (1 R. S. 39,) to apply to the surrogate for authority to mortgage or sell so much of the real property as would be necessary to pay the debts. He did nothing of the kind. Clothed as he was with the most ample powers to protect the trust property and preserve it for the creditors and legatees, he made no effort to exercise them or to avert or postpone the occurrence of the event which ultimately took away the principal means left by the testator for the payment of the debts and legacies. His mere omission to do what he should have done might not render him personally chargeable with the consequences, but when he becomes the purchaser at the sale, and the omission is coupled with an act which transfers the estate to himself at less than half its value, it becomes a serious question whether upon these facts alone—if there were no others of a suspicious character—he can be permitted to hold it.

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The creditors of a deceased debtor are effectually restrained from taking any proceedings to charge the heir at law, or the devisee, in respect to the lands devised or descended, until the lapse of three years after the granting of letters testamentary or of administration. (2 R. S. 46, § 53.) For the first eighteen months of this period, the executor or administrator can not be compelled to render and settle his accounts. (*Id.* 32, § 52.) And until the account is rendered and a deficiency of personal assets is disclosed, no order can be obtained against him to show cause why he should not be required to mortgage, lease or sell the real estate for the payment of debts. (*Session Laws of 1887*, 536, § 72.) The facts disclosed by the pleadings and the special verdict in this case, give the transaction a most unfavorable aspect. If they do not of themselves afford sufficient reason to vacate the sale, they will at least serve to vindicate the wisdom and policy of the rule which forbids a trustee to become a purchaser of the trust property for his own benefit. The complaint charges that the defendant solicited Drury to foreclose the mortgage. That he refused because, as he said, he had no use for the money. This the answer does not deny, but the defendant says, that whatever was said by him to Drury was said in good faith. He is also charged in the complaint with having induced Mr. Wager to become the assignee of the mortgage, with a view to foreclose it. This he also denies, but he believes that he mentioned the subject to him. What subject? The subject of becoming the purchaser of the mortgage. He also denies that the purchaser of the mortgage acted as his attorney in the business of the estate, previous to the accounting before the surrogate, but he admits that he was the attorney upon such accounting, and when the decree was obtained which disclosed to the creditors the extent of their loss, and which is now set up as a legal barrier to a re-sale of the property. He also admits that he became aware of the insufficiency of the personal assets to pay the debts, a short time after the testator's death, and that it would be necessary to sell the lands. He gives as a reason for not selling under the will, that he found it so defective that a perfect title could not be given to a pur-

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chaser under it, because the widow was living; but he assigns no reason for not proceeding to sell, by a surrogate's order under the statute. He denies that the mortgage was foreclosed without notice to the parties in interest, but says that it was well understood by the widow and heirs—amongst whom he and his wife are to be enumerated—that it would be for their interest to have it foreclosed, and they fully assented thereto. Two months after the death of the testator the bill was filed; two months thereafter the decree was obtained, and six weeks after that, the farm was sold, and the title passed to the defendant, under the master's deed, for less than half its value. All this was done while the courts of justice were closed against the creditors, before they could possess themselves of a knowledge of the true condition of their debtor's estate, and while their sole reliance against the waste and destruction of the estate was in the integrity and good faith of the defendant. A decree of the surrogate would have brought the farm into market upon terms advantageous and just to the mortgagee, the widow, creditors and legatees. The title would have been perfect. It would have been the interest, as it certainly was the duty of the executor, to make every reasonable effort to sell for the largest possible price that could be obtained. He chose however to vacate his true position; to become a purchaser instead of a vendor; to have the estate transferred to himself at the lowest price, instead of transferring it to another at the highest. I can not misunderstand the force of the facts to which I have referred. They are pregnant with meaning, and leave no manner of doubt in my mind that the assignment and transfer of the mortgage, the decree for its foreclosure, and the sale of the farm to the defendant, were all brought about by his own assent and procurement.

The rule that a trustee or person standing in a situation of trust and confidence, shall not purchase or deal with the subject of the trust, for his own benefit, is said to be absolute and universal. It is subject to no qualifications and to no exceptions. "The principle applies, however innocent the purchase may be in a given case. It is poisonous in its consequences. The

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cestui que trust is not bound to prove, nor is the court bound to decide, that the trustee has made a bargain advantageous to himself. There may be fraud and yet the party may not be able to show it. It is to guard against this uncertainty and hazard of abuse, and to remove the trustee from temptation, that the law does and will permit the *cestui que trust* to come at his own option, and without showing essential injury, to insist upon having the experiment of another sale. So that in fact, in all cases where a purchase has been made by a trustee, on his own account, of the estate of his *cestui que trust*, although sold at public auction, it is in the option of the *cestui que trust* to set aside the sale, whether bona fide or not." (*Story's Eq. Juris.* § 322. *Ex parte Bennet*, 10 *Vesey*, 385.) "If a trustee or executor compound debts or mortgages, or buy in for less than is due, he shall not take a benefit of it to himself; for when he takes the trust he takes it for the benefit of the *cestui que trust*. He can not be permitted to raise in himself an interest opposite to that of the party for whom he acts." (*Van Horne v. Fonda*, 5 *John. Ch. Rep.* 388. *Ex parte James*, 8 *Vesey*, 337.) "No trustee shall buy the trust property until he strips himself of that character, or by universal consent has acquired a ground for becoming the purchaser." "A trustee who is intrusted to sell and manage for others, undertakes, at the same moment in which he becomes a trustee, not to manage for the benefit and advantage of himself." (*Ex parte Lacey*, 6 *Vesey*, 625. 4 *Kent's Com.* 438. *Whichcote v. Lawrence*, 3 *Vesey, Jr., Sum. ed.* 740, and note a. *Vide also Davoue v. Fanning*, 2 *John. Ch. Rep.* 252.) The rule is to be enforced with unrelenting rigor, and is not to be limited in its application to those cases where the trustee himself sells the estate. Its object is to afford the *cestui que trust* the most ample protection against fraud and injustice, and remove out of the way of the trustee all inducement to profit by his superior knowledge, and all temptation to speculate upon property which he is under the most binding obligations to manage and sell to the best advantage of others. Purchasers at sales under judgments and decrees which are to be paid and extinguished with the proceeds

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of the trust property, or those made under decrees, made to enforce the execution of the trusts of a deed, or other instrument, fall within the reason and scope of the rule; for such sales afford as strong temptations and offer as wide a field for speculation and profit, as sales made by himself. They bring the interest of the trustee into direct conflict with that of the *cestui que trust*, and convert the relations of friendship and amity into those of hostility. We have seen that an executor who compounds debts and mortgages, or buys in claims against the estate for less than is then due upon them, shall not take the benefit to himself. He can not be permitted to raise in himself an interest in opposition to the person for whom he acts. And this is said to be a fundamental doctrine in equity. So I apprehend when an executor, with power to sell under the will, or whose duty it is to exert that power with the aid of a surrogate's order, upon becoming aware of the insufficiency of the personal assets, purchases the trust property at a sale under a mortgage or other incumbrance, for less than its value, he must take it for the benefit of those for whom he is bound to act, provided they assert their right to have it so appropriated, within a reasonable time. Such I understand to be the law of this court. In *Rogers v. Rogers*, (3 *Wend.* 508,) the court of errors decided that an executor, by virtue of his office, becomes a trustee for the devisees and creditors of the testator, whenever it is ascertained that the personal property is insufficient to pay the debts. And that he will not be permitted to sell the real estate of his testator, under a judgment held by him, and become himself the purchaser. In *De Caters and wife v. Le Ray De Chaumont and others*, (3 *Paige*, 178,) a decree had been obtained to carry into effect the provisions of the trust deed and for a sale of the trust estate by the defendant Le Ray De Chaumont, who was the trustee. He made a special application to the chancellor, for leave to become a purchaser at the sale, upon the ground that the estate was largely indebted to him for advances made on its account. The chancellor denied the application, assigning as the principal reason that most of the creditors were foreigners, residing in France,

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Belgium and Holland. That the trustee was presumed to have made himself acquainted with the lands which constituted the trust estate, and if permitted to purchase for himself, "he would have it in his power to obtain the best parts of it upon his own terms, merely by withholding information, which the *cestuis que trust* could never have it in their power to obtain. And that if he, by virtue of his trust, had superior advantages of information in respect to the situation and value of the property, so that he could not come to the sale upon terms of equality with other bidders, the court would not put him in a situation where his duty and his interest would come in conflict." In *Van Epps and wife v. Van Epps*, (9 Paige, 237,) the complainants were the owners of a farm in Greenbush, subject to a mortgage to secure \$5000, with the interest, to the defendant, and by him assigned to the New-York Life Insurance and Trust Co. They sold the farm to Spencer, who assumed the payment of the money due on the mortgage, and to secure \$6000 of the purchase money with the interest, executed another bond and mortgage upon the same premises, to the defendant. He thereupon gave to the complainants a written declaration under his hand and seal, that he received such bond and mortgage for the use and benefit of the complainants, to receive the interest and pay over to them during their lives, &c. Spencer became insolvent, and the Trust Company foreclosed the prior mortgage, and at the sale the defendant became the purchaser, for \$6450. The judgment of the court was, that as the defendant held the junior mortgage as trustee for the complainants, he could not purchase at the sale under the decree to foreclose the senior mortgage for his own benefit, to the prejudice of his *cestuis que trust*. In *Torrey v. Bank of Orleans*, (9 Paige, 649,) the rule is again recognized and reasserted, and the court declares it to be a settled principle of equity, of universal application, that a person placed in a situation of trust and confidence in reference to the subject of the sale can not become the purchaser on his own account. That no person can be permitted to purchase an interest in property where he has a duty to perform inconsistent with his character

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as purchaser. These authorities are decisive of the main question involved in this cause, and entitle the plaintiff to the relief claimed.

The judgment rendered at the special term must be reversed, and the plaintiff is entitled to recover his costs from the defendant. Unless the defendant elects, within sixty days after service of a copy of the decree, to pay the debt of the plaintiff referred to in the pleadings, with the interest and costs of this action, then the plaintiff will also be entitled to a decree or order that the farm and premises referred to in the pleadings be re-sold, and the proceeds applied 1st. To the payment of the amount bid by the defendant at the master's sale, with the interest; 2d. To the payment and satisfaction of such sum as the widow would have been entitled to receive for her dower; and 3d. To the payment of the debts of the testator.

The widow and legatees make no complaint, and do not ask for a re-sale. They are not therefore necessary parties. The creditors are necessary parties, unless the complaint is amended by inserting therein the usual clause, that the plaintiff prosecutes as well on behalf of himself as of all the other creditors who may elect to come in under the decree, and contribute to the expenses of the litigation. (*Story's Eq. Plead.* 99. *Hallet v. Hallet*, 2 *Paige*, 19.) Leave is given to the plaintiff to make this amendment, without costs, or further notice to the defendant. (*Code*, 170.)

[DUTCHESS GENERAL TERM, July 7, 1851. *Morse, Barculo and Brown*, Justices.]

M. and D. WALRATH vs. REDFIELD.

In an action on the case for damages to the plaintiffs' saw mill and other property, occasioned by the act of the defendant in constructing a dam and dike below such mill, and thereby causing the water to flow back upon the mill, and rendering it incapable of being used, the plaintiffs are only entitled to recover the value of the use of their mill during the time they were necessarily deprived of the use of it, and the amount which it was permanently diminished in value by the erection of the dam. They can not recover the amount of a loss upon saw logs on hand at the time of the injury, sustained either in consequence of a deterioration in their value, or by a depression in the market price.

In such an action, the *onus* of showing that the entire damages claimed resulted necessarily from the act of the defendant is upon the plaintiff.

The damages in respect to the saw logs must be averred in the declaration, and proved upon the trial, and they are too speculative, uncertain, remote and contingent, to be allowed, even upon proof that the plaintiffs could not, by the use of ordinary diligence, have procured the logs to be sawed, elsewhere, and could not have disposed of them before sawing.

In actions of tort, where there has been no willful injury, the plaintiff can only recover the damages necessarily resulting from the act complained of, and he can not conduct in such a manner as to make the damages unnecessarily burdensome.

THIS was an action on the case for damages to the plaintiffs' mill and other property, situated on the Chittenango creek, in the county of Madison, and was tried at a circuit court held in that county in December, 1849, before Mason, justice. The plaintiffs were the owners of a saw mill on the west side of the Chittenango canal, which was used as a feeder to the Erie canal at Chittenango. The mill was supplied with water from the Chittenango creek. In 1840, the defendant who was a superintendent of the canal, constructed a dam and dike to turn the waters of the Chittenango creek into the Chittenango canal and feeder, a short distance below the plaintiffs' mill, with a view to supply water for the Erie canal; and in so doing caused the water to flow back upon the plaintiffs' mill, and rendered it incapable of being used. The dam was subsequently carried off by a freshet, and in the mean time the plaintiffs had raised their mill a few feet, at an expense of \$450 to \$600. The plaintiffs, at the time of the erection of the dam by the defend-

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ant, had on hand some 2000 to 2500 logs, which were kept by the plaintiffs until the dam was carried off in the spring of 1842, and were badly worm-eaten, and damaged from one third to one half their value. The plaintiffs also lost the earnings of their mill so long as it remained idle in consequence of the erection of the dam. The jury, under the charge of the court, found a verdict for the plaintiffs for \$3700 and the defendant now moved for a new trial, upon a case.

T. Jenkins, for the plaintiffs.

W. Hunt, for the defendant.

By the Court, ALLEN, J. The jury have found that the defendant was a wrongdoer in the erection of the dam which caused the injury to the plaintiffs' mill, and that the title to the premises occupied by the plaintiffs' mill and machinery had not vested in the state; that the presumption of title in the state which resulted from the map and accompanying documents which were given in evidence, and which by law are made presumptive evidence of such title, (1 R. S. 218, §§ 4 to 7. *Laws of 1837*, p. 518,) were overcome by the other evidence in the case. Several questions of some difficulty are presented, upon the rulings and decisions of the justice upon this part of the case. But as we are of the opinion that the measure of damages adopted by the jury under the direction of the court was erroneous, and that a new trial must be granted for that reason, and as the evidence may be materially different upon another trial, or another jury may arrive at very different conclusions upon the same evidence, we do not propose to examine the questions made upon the right of the plaintiffs to recover.

The defendant requested the judge to instruct the jury in respect to the damages, 1st. That the plaintiffs had no right to allow the dam to stand for 21 months and charge the defendant for the damage during that period; that they were only entitled to the expense of abating it and the loss occasioned by its standing still while necessary to abate it; or, 2d. That the

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plaintiffs were only entitled to damages for raising the mill, the loss by its standing still for the ten days necessary to raise it, and its diminished value as raised; and 3d. That the loss by worms eating the logs was too remote, and not a necessary consequence of the act done; that the logs might have been sold, or otherwise disposed of. The court refused to charge as requested in either proposition; and in answer to the third proposition charged the jury that in this action the plaintiffs, if entitled to recover at all, were entitled to recover the actual damages which legitimately flowed from the wrongful act of the defendant. That whether the damage to the logs resulted in consequence of the wrongful acts of the defendant in depriving the plaintiffs of the lawful use of their mill and water privilege, was a question which the court should leave to the jury; and that if the jury found that issue in favor of the plaintiffs, then they should take that item of damage into account in making up their verdict; otherwise not. With the exception of the fact that after the construction of the dam by the defendant, the logs could not have been sawed at the mill of the plaintiffs, which had been rendered useless for the time being, there was no evidence that the injury to the logs was the consequence of the act of the defendant. So that the charge and instruction to the jury, in substance and effect, was that if the mill of the plaintiffs was stopped by the wrongful act of the defendant, by means whereof the plaintiffs were unable to saw the logs at that mill, and the logs during the suspension of the sawing at the mill, became worm-eaten and injured, the defendant was responsible in this action for the injury. There was no evidence that the logs could not have been sawed at once, in the immediate neighborhood, or disposed of for their full value, or that the logs were necessarily suffered by the plaintiffs to remain and incur the injury complained of. Neither is there any reason to suppose that the injury to the plaintiffs was committed willfully or wantonly by the defendant. In cases in which there is neither fraud, malice or oppression, the law will not generally, in making compensation to the injured party, take into consideration remote or consequential damages. The mea-

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sure of damages is the direct pecuniary loss sustained by the party. Mr. Greenleaf, in his Treatise on Evidence, says, "The damage to be recovered must always be the natural and proximate consequence of the act complained of." (2 *Greenl. Ev.* § 256.) This proposition appears to be well settled by adjudications. (*Armstrong v. Percy*, 5 *Wend. R.* 535. *Cram v. Peters*, 6 *Hill*, 522. *Vicars v. Wilcocks*, 8 *East*, 1. *Downer v. Madison County Bank*, 6 *Hill*, 648. *Loker v. Damon*, 17 *Pick.* 284. *Smith v. Condry*, 1 *How. R.* 28.) The difficulty is in applying the rule to cases as they arise in practice; there being no well defined and easily recognized boundary line between damages which are natural, necessary, direct and proximate, and those which are remote and contingent. Many of the cases to be found in the books are border cases, and courts have not always been uniform in the decision of cases apparently within the same principle. The plaintiffs were probably entitled to recover the value of the use of their mill during the time they were necessarily deprived of the use of it, and the amount which it was permanently diminished in value in consequence of the erection of the dam. (*White v. Moseley*, 8 *Pick.* 356.) These were damages which necessarily and naturally resulted from the act of the defendant. I do not think that the plaintiffs were called upon at their peril to abate the dam which had been erected by a state officer, under a claim of right, and for state purposes. But to go farther and allow the parties what they have lost upon their logs, either in consequence of a deterioration in their value, or a depression in the market price, would be very analogous to the allowance of unearned and contingent profits, which in no case is allowable. (*Blanchard v. Ely*, 21 *Wend.* 342. *Giles v. O'Toole*, 4 *Barb.* 261.) The cases referred to, it is true, are cases upon contract, but the rule is the same in actions of tort, in the absence of fraud, gross negligence and wantonness. (21 *Wend.* 350. 3 *Wheat.* 546. 1 *Howard*, 28.) It would hardly be contended that the plaintiffs could have recovered the anticipated and probable profits upon any contract which they might have had for sawing for a third person, and which contract they had become incapacitated

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to perform by the act of the defendant. (*Masterton v. The City of Brooklyn*, 7 Hill, 61.) And yet I see but little distinction between such a demand and the one allowed in this case. The jury have in fact, under the direction of the court, allowed the plaintiffs, 1, the value of the use of their mill ; and 2, not precisely the profits which they might have made by sawing their own lumber, and under that name, but what they would have saved by being permitted to saw it, which is nearly equivalent. It was a species of damage which will not be implied, but must be averred in the declaration and proved upon the trial. It was not a loss which the defendant had a right to expect would result from the stoppage of the mill. In marine trespasses the probable or possible profits of a voyage which has been broken up by a collision, are not allowed in the assessment of damages ; the courts adopting the rule and measure of damages applicable to the contract of insurance. (*The Amiable Nancy*, 3 Wheat. 546. *La Amistad de Rues*, 5 Id. 385. *Smith v. Condy*, 1 How. 28.) In an action against an officer for attaching a vessel bound on a voyage, the court instructed the jury to estimate the damages according to the value of the vessel at the time of taking. "and the additional damage sustained, if any." And it was held that this did not authorize the jury to assess damages for the breaking up of the voyage. (*Boyd v. Brown*, 17 Pick. 458.) Upon a complaint filed by a land owner pursuant to a statute of Massachusetts, to recover compensation for injury done to his land by its being overflowed or otherwise injured by a mill dam, he can not recover damages arising from offensive smells proceeding from the flowed land when the water is drawn off, whereby his contiguous land is rendered less valuable for building purposes. In *Eames v. The New England Worsted Company*, (11 Met. 570,) Shaw, C. J. says the object of the statute was to compensate the owner of land flowed for all the damages *directly* resulting from that cause ; and that the damage sought to be recovered in that case was too remote and contingent and not within the mill act. The assessment of damages in this case for the depreciation in the value of the saw logs of the plaintiffs would involve the

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consideration of many facts, probabilities and uncertainties as to the degree of care which had been or might have been exercised by the plaintiffs in the preservation of the property; the probable ability of the plaintiffs to saw the logs and perform their other engagements, had they been unmolested in the enjoyment of their mill; and whether the lumber might or might not have been liable, when sawed, to a similar depreciation in value. The damages for this cause, I think, are entirely too speculative, uncertain, remote and contingent, to be allowed even upon proof that the plaintiffs could not, by the use of ordinary diligence, have procured the logs to be sawed, and could not have disposed of them before sawing.

But upon the case before us, a new trial should be granted, for the want of evidence that the damages claimed did necessarily result from the act of the defendant; that it did not result from the negligence of the plaintiffs properly to care for and dispose of their property in time to prevent loss from a depreciation in value. In actions upon contract it is well settled that the party complaining of a breach of the contract can only recover the damages necessarily resulting from such breach, and he can not conduct in such a manner as to make the damages unnecessarily burdensome. (*Wilson v. Martin*, 1 Den. 602.) The same rule should apply to actions of tort, where there has been no willful injury to the rights of another. The plaintiffs in this action, if they had an opportunity, should have procured their logs to be sawed at other mills, and thus prevented the injury of which they complain; and if they had no opportunity to do so, they should have given some evidence of it upon the trial. In *Henry v. Henry*, (2 Den. 625,) a different rule was adopted, for the reason that the injury in that case was willful; the court holding that in such a case the injured party was not bound to take any measures to mitigate the injury. If the plaintiffs by using reasonable precautions and such as would ordinarily be employed by a prudent man in the preservation of his property, could have prevented the loss by the injury to the logs, they can not recover for such loss in this action. (*Sedgwick on Damages*, 98. *Loker v. Damon*, 17

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Pick. 284.) As well might they upon a total destruction of their mill, claim to recover the value of all logs on hand, and the profits which they might probably have made upon any contract in force for sawing lumber, and which they were disabled from performing. The *onus* of showing that the entire damages claimed resulted necessarily from the act of the defendant, was upon the plaintiffs, and they failed in establishing that fact in relation to this part of the damages claimed and assessed by the jury.

A new trial is granted; costs to abide the event.

[JEFFERSON GENERAL TERM, July 7, 1851. *Pratt, Gridley, Allen and Hubbard, Justices.*]

BEECHER vs. BENNETT.

Prior to, and on the 18th of December, 1846, the plaintiff was a joint owner, with W. & B., of a quantity of clover seed. On that day an arrangement was made between the parties, by which it was agreed that the plaintiff should hold on to the clover seed, (which was then stored at B. in his name and for his account, and subject to his order,) and sell it as he saw fit, if necessary to pay certain drafts which had been drawn by the plaintiff upon W. & B. to pay for the clover seed, and which drafts were then due and unpaid, W. & B. having failed in business. Subsequent to this arrangement, W. & B. transferred the clover seed to the defendant, in payment of individual debts owing by them to him; and he obtained possession of the property. In an action of trover, for the clover seed, brought by the plaintiff against the defendant; *Held*, 1. That on the failure of W. & B. the plaintiff had a right to insist upon the application of the property to the payment of the debts contracted in its purchase; which right might be secured by an arrangement between the parties.

2. That the joint owners having, by such arrangement, placed the property in the custody of the plaintiff, for the purpose of paying such debts, and having advised the creditors of the arrangement, they could not afterwards rescind the same, without the consent of all concerned.
3. That the defendant, having taken the assignment from W. & B. with full knowledge of the legal and equitable rights of the plaintiff, was not, as against him, a *bona fide* purchaser of the property, or of the interest of W. & B. therein; but took his assignment subject to the prior rights of the plaintiff, and was liable to him in an action of trover.

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THIS was an action of replevin, in the detinet, to recover a quantity of clover seed. The action was brought by and in the name of Rial Wright, but upon his death, after the trial of the cause, the present plaintiff, who claimed as assignee, was by order of the court, substituted as plaintiff on the record. The cause was tried before Hon. Hiram Gray, at the Onondaga circuit in October, 1848. Upon the trial, the plaintiff proved that in 1846, Wardwell & Bardwell were commission merchants in Albany, and that an arrangement was made between them and himself that he should go west and purchase produce jointly for himself and Wardwell & Bardwell, to be paid for by drafts to be drawn by him on Wardwell & Bardwell. That there was nothing said as to how the drafts were to be paid or taken up. The plaintiff gave in evidence several letters from W. & B. to himself, written in November, 1846, desiring him to make arrangements to meet the drafts which he had made upon them in pursuance of the arrangement, either by a sale of the produce purchased, or by redrawing upon them, or to forward to their store house receipts to enable them to raise the money. Mr. Wardwell, one of the firm of Wardwell & Bardwell, testified that the plaintiff and Wardwell & Bardwell were to share the profit and loss; that "the partners were Dr. Wright and ourselves" (W. & B.) It also appeared in evidence that the plaintiff was not to furnish any capital, and that it was contemplated that the property purchased should be forwarded to and sold by Wardwell & Bardwell, and the plaintiff was to receive one half the net profits. Wardwell & Bardwell stopped payment about the middle of November, and failed in business about the first of December, 1846. In December, 1846, and before the middle of that month, the clover seed for which this action was brought, arrived at Buffalo, in steamboats, from Ohio, and was stored by the plaintiff in his own name, with H. W. Millard, a warehouseman at that place, who receipted it as "Received in store from Rial Wright, Esq. for his account and subject to his order." On the 18th of December, as Mr. Wardwell testified, his firm made an arrangement with the plaintiff that he should hold onto the clover seed, and sell it as he saw fit, if necessary to pay the drafts which

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were due and unpaid, among which were the drafts given on the purchase of the seed in question ; and on the same day wrote to the banks holding the drafts, informing them of this arrangement. On a cross-examination he said that the conversation with the plaintiff on this occasion, was in substance as follows : " We said, you made the drafts ; we accepted them, and were unable to pay them. The seed is in Buffalo, in your possession : you can sell it as you see fit, and pay the drafts." Wardwell & Bardwell were largely indebted to the Salina Bank upon transactions in which the plaintiff was not interested, and on the 28th of November, 1846, they gave an order on the plaintiff for 700 bushels of clover seed then in his possession, in favor of one E. C. Adams, for the benefit of the bank. On the same day they received of one G. Townsley his acceptances at 20 and 30 days for \$3000, on account of purchase of clover seed then lying at Buffalo, on their account, as expressed in the receipt and agreement, and the seed was to be shipped by railroad and subject to the order of Townsley on arrival, to the amount of one thousand bushels. On the 22d of December, 1846, to carry out this arrangement, and also to secure Adams against his liability as drawer of certain bills accepted by Wardwell & Bardwell, and held by the Salina Bank, Wardwell & Bardwell delivered to Townsley a note stating the purchase by Townsley, of them, of two thousand bushels of clover seed, being the same lot of seed purchased for their account by Rial Wright, of Syracuse, and that said seed was subject to the order of Townsley, at Buffalo, (he paying charges, &c.) price \$3 per bushel, amount, \$6000, and that payment was received by his acceptances dated Nov. 28, 1846, \$3000, and by paid E. C. Adams \$3000. The \$3000 mentioned as paid to Adams, was not paid to him, but was to be paid out of the proceeds of the property. The acceptances of Townsley, of November 28, were given to enable Wardwell & Bardwell to raise money, and were designed to be used in paying for the seed, but were delivered to the Salina Bank upon a former indebtedness of Wardwell & Bardwell. Townsley contested his liability to pay them. The plaintiff refused to recognize the right of Wardwell & Bardwell to dispose of the seed,

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and did not deliver it in pursuance of the order and transfer above stated. On the 1st of January, 1847, Townsley, without acknowledging his liability upon his acceptances, and leaving that an open question, transferred to the defendant, who was cashier of the Salina Bank, and acting in its behalf, the bill of sale or transfer of the 22d of December, and all claims under it, and within a day or two thereafter, and in the absence of the plaintiff, the defendant obtained possession of the seed from the warehouse keeper. The defendant had notice of the plaintiff's claim. At the close of the trial, the plaintiff's counsel moved for a nonsuit, on several grounds. The only one which was stated in the bill of exceptions was, that Wardwell & Bardwell and Wright were jointly interested in the property; that the verbal transaction of December 18, was no more than a mere power to sell the clover seed for the purpose of paying the drafts, which was revocable, and that the subsequent sale or assignment by Wardwell & Bardwell, was a revocation of that power; that under the assignment the defendant had succeeded to all the rights of Wardwell & Bardwell, and having got possession of the property, he was not liable in this action. The court thereupon held and decided that this action at law would not lie, and directed a verdict for the defendant. To which ruling and decision, the plaintiff's counsel excepted, and the jury found a verdict for the defendant, and the plaintiff now moved for a new trial, upon a bill of exceptions.

L. R. Morgan, for the plaintiff.

G. F. Comstock, for the defendant.

By the Court, ALLEN, J. The position taken by the counsel for the defendant upon the trial, and which was sustained by the learned justice, relieves us from the examination of some of the questions which were made upon the argument before us. No question is presented by the bill of exceptions as to the relations which the plaintiff and Wardwell & Bardwell sustained to each other in respect to the property in question, and

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their respective rights therein. The defendant assumed upon the trial that Wardwell, Bardwell and Wright were jointly interested in the property, and we can not presume that on any of the grounds taken by the defendant and which are not stated, positions inconsistent with this express admission were taken by him, or that the court based its decision upon a state of facts inconsistent with those admitted by the counsel for the defendant to have been established.

Upon this bill of exceptions, then, it stands admitted that the plaintiff was, prior to and on the 18th of December, 1846, a joint owner of the property in controversy, with Wardwell & Bardwell, and the only question before us grows out of the arrangement made on that day between them, and the effect to be given to it and the subsequent transfer by Wardwell & Bardwell of the property, under which the defendant claims title. The only evidence of the arrangement of the 18th of December, is the testimony of Mr. Wardwell, one of the firm of Wardwell and Bardwell, who testified on his direct examination, as follows: "From about the middle of November we ceased to pay. On the 18th of December we made an arrangement with Dr. Wright that he should hold on to the clover seed, and sell it as he saw fit, if necessary to pay these drafts, which were due and unpaid. It was a verbal agreement. I wrote to the Ohio banks (by whom the drafts were held) the same day, and informed them of the arrangement." On his cross-examination he testified, "The substance of the arrangement of the 18th of December was, that he (the plaintiff) had the seed in his possession and could take care of the drafts." "We said you made the drafts, we accepted them and were unable to pay them. The seed is in Buffalo in your possession: you can sell it as you see fit, and pay the drafts." This arrangement the judge held, in response to the claim of the defendant's counsel, to be a mere power to sell the clover seed for the purpose of paying the drafts, which was revocable: and that the subsequent sale or assignment by Wardwell & Bardwell was a revocation of that power; that under the assignment the defendant had succeeded to all the rights of Wardwell & Bardwell, and having

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got possession of the property he was not liable in this action. Previous to the 18th of December, and of course before the transfer under which the defendant claims title, Wardwell & Bardwell had failed in business, leaving the drafts, given upon the purchase of the clover seed and upon which the plaintiff was liable as drawer, unpaid.

The plaintiff was in possession of the property, holding warehouse receipts therefor in his own name, and the defendant claims to hold the property under a transfer made by W. & B. to pay their individual debts. Whether a technical partnership existed between the plaintiff and Wardwell & Bardwell, with all the rights incident to that relation, in respect to the property at the time of the alleged transfer under which the defendant claims, or at any time, is not necessarily involved in the decision of this cause. The joint ownership of the property on the 18th of December, the indebtedness of the owners for the same property, and the failure and insolvency of Wardwell & Bardwell, stand admitted upon the record, and there can be no doubt that the plaintiff, as well as the creditors of himself and W. & B. had a right to insist upon the application of the property to the payment of the debts contracted in its purchase. This right could not have been enforced except in a court of equity; but I apprehend that the same result might well be secured by an arrangement between the parties interested. In the absence of any conventional arrangement of the joint owners, the right to the possession would have been equal in all, and neither would have had the right to claim it from either of the others.

A trust might have been created in a third person, by the act of all the parties, which would have invested such third person, as a trustee, with the possession and right of possession of the joint property, for the benefit of all concerned, and upon proceedings in a court of justice to enforce the rights of the parties and their creditors, in the application of the property to the payment of debts, a receiver of such property would have been appointed, to take possession of the property and dispose of the same under the direction of the court. I am unable to

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see why one of the joint owners may not be made the trustee or receiver of this property, by the consent of all, and without the necessity of a formal assignment, or the intervention of a court of justice, subject only to the right of the creditors to object, and insist upon a disposition of the property which would more effectually secure their interests. The owners consenting to and actually placing the property in the custody of one joint owner for the purposes named, and advising the creditors of the arrangement, can not afterwards rescind this arrangement without the consent of all concerned. The consideration upon which it was made, is ample to sustain it; and the other joint owners, as well as the creditors, having by this arrangement accomplished all they could hope to do by legal proceedings, to wit, secured the application of the property to the payment of the debts to which by law it should be appropriated, were precluded from taking legal measures to protect those rights. (10 *Paige*, 205.) All that they could transfer was their interest. If a partnership had ever existed between the parties it had ceased to exist, and they were mere tenants in common; and the assignee of the interest of Wardwell & Bardwell took the assignment subject to the prior rights, legal and equitable, of the plaintiff. (*Marquand v. The New-York Man. Co.*, 17 *John*. 525.) It must be irrevocable by the parties originally assenting to it, and consequently by all claiming under them by title subsequently acquired. (See *Bradford v. Kennedy*, 3 *John. Ch.* 431.) The power vested in the plaintiff was not a naked power, but a power coupled with an interest. The death of the other parties would not have revoked it, and neither will their subsequent transfer of their interest. It would be unjust to allow an arrangement of this kind, entered into to prevent the necessity of legal proceedings and to secure to parties their legal rights, and no more, to be made and unmade at the pleasure of one of the parties, and especially to allow it to be rescinded to enable a fraud to be perpetrated upon the innocent owners of the property, and their creditors.

If the party in whom confidence has been reposed by all the owners of the property, is taking measures to divert and mis-

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apply the property, the other parties and all claiming under them have a remedy, but not by rescinding the arrangement and resuming the possession of the property. The question made upon this bill of exceptions was before me at special term, upon a demurrer to a complaint in the nature of a bill in equity for a due administration of this property, as the trust property of the plaintiff and W. & B., filed after the decision of this cause, and upon the ground that the remedy of the plaintiff was in equity and not at law, in pursuance of the clear instruction of the learned judge upon the trial of this cause. In accordance with the position then taken by the defendant's counsel I decided that by the agreement of the 18th of December, 1846, the joint possession of the parties was severed; and the plaintiff Wright acquired a separate estate in the property, and a right to the exclusive possession of it. Creditors of the firm might contest the *bona fides* of the transaction, if it was attempted to withdraw the property and place it beyond the reach of the creditors of the three, for debts created in its purchase, but as between the parties the agreement vested the property, and the exclusive right of possession, in Wright. (*Ex parte Ruffin*, 6 Vesey, 119. *Ex parte Williams*, 11 Id. 3. *Coll. on Part.* 509. *Boynton v. Page*, 13 Wend. 425; and see *Story on Part.* §§ 357, et seq. 396.) If Wright had not been in possession of the property at the time of the agreement, the transfer would have vested the title in him, and authorized him to take possession whenever he pleased, or to claim the property of any person in whose possession he should find it, not having a title valid as against him. And I then held that the plaintiff had a remedy at law, and that his defeat at the circuit did not give to a court of equity jurisdiction in the premises. (*Vilas v. Jones*, 1 Comst. 274. *Green v. Clarke*, in court of appeals, MS. *Story's Eq. Jur.* § 897. 7 Cranch, 332. 1 John. Ch. 91.) Upon a review of the questions, which I think are the same essentially in both actions, I see no reason to change my opinion. Indeed the able counsel for the defendant did not, upon the argument of this cause, controvert the positions taken by him upon the demurrer in the equitable action;

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or passed upon on the decision of the demurrer therein. His argument was based principally upon facts and positions which we think are not properly presented upon the bill of exceptions in this cause, and which we therefore do not consider. My associates are also of the opinion that the defendant is not, as against the plaintiff, a bona fide purchaser of the property, or of the interest of W. & B. therein: that the circumstances establish very clearly the fact that he took his title with full knowledge of the legal and equitable rights of the plaintiff, and with a view to deprive him of them, and with the intent to defraud him and the creditors of the three of their just rights, and that for that reason the learned judge erred in withdrawing the case from the jury, and directing a verdict for the defendant.

A new trial is granted; costs to abide the event.

[JEFFERSON GENERAL TERM, July 7, 1851. *Pratt, Gridley, Allen and Hubbard, Justices.*]

M. & D. WALRATH vs. BARTON.

In an action of trespass, for diverting water from the plaintiffs' mill, the defendant, by giving evidence tending to show title to the *locus in quo* in the state, is not precluded, as by an estoppel, from proving that the water was taken in pursuance of the laws of the state, by the direction of a canal commissioner, for a temporary supply of water for the state canal.

A superintendent of a canal may justify taking the waters of a stream, for the temporary use of the canal, in pursuance of the directions of a canal commissioner, although at the time of diverting the water he did not claim to act in obedience to the directions of the canal commissioner, and to take the water as a temporary and not as a permanent appropriation.

THIS was an action of trespass, for damages to the plaintiffs' mill, situated on the Chittenango creek, in the county of Madison, and was tried before Mason, justice, at the Madison circuit in December, 1849. The injury complained of consisted in the erection of a dam at the head of the plaintiffs' flume, and taking

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boards from the top of the bulkhead, by which the water was diverted from the plaintiffs' mill into the Chittenango canal and feeder, to supply the Erie canal with water. The defendant was superintendent of the Erie canal, and as such, committed the acts complained of. After proof of the injury, the defendant gave in evidence a transcript of the map of the canal and feeder, at that point, made under the provisions of 1 R. S. 218, §§ 4, 5, 6, and adopted by the laws of 1837, p. 518, § 6. The introduction of the map and accompanying certificates in evidence was objected to by the plaintiff, and certain facts and circumstances were insisted and relied upon by the plaintiff as overcoming the presumption of title in the state, resulting from the map; and upon this evidence, under the instructions of the court, the jury found in favor of the plaintiffs. After the introduction of the map and certificates, the defendant proposed and offered to prove that the defendant took the water by direction of Jonas Earl, the acting canal commissioner on that section of the Erie canal, for a temporary supply of water for that canal. This evidence was objected to, for several reasons, and excluded by the court upon two grounds, which are referred to in the opinion of the court. The jury rendered a verdict for the plaintiff, and the defendant now moved for a new trial, on a case.

T. Jenkins, for the plaintiffs.

W. Hunt, for the defendant.

By the Court, ALLEN, J. Several reasons were urged by the counsel for the plaintiffs, upon the trial, in support of his objection to the evidence offered by the defendant, that the water, for the diversion of which this action was brought, was taken by direction of the acting canal commissioner, for a temporary supply for the Erie canal. But as the decision of the judge was based upon two grounds distinctly put forth, and as some if not all the other grounds urged by the plaintiffs' counsel might possibly have been obviated by further evidence on the part of the defendant, it will be proper to examine solely the grounds upon which the

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decision of the judge, in excluding the evidence, was put. These reasons were, 1. That the defense proposed to be established by the evidence offered was inconsistent with the defense already put forth; and 2. That the facts offered to be proved would afford no justification to the defendant, unless at the time of doing the act complained of he claimed to act in obedience to the canal commissioner and to take the water as a temporary and not as a permanent appropriation. At the time the evidence was offered the defendant had not closed the evidence on his part. The case was still with him, and there was therefore no question addressed to the discretion of the court, in relation to his right to make a new case in reply to his adversary, as was the case in *Edwards v. Sharratt*, (1 *East*, 604,) and in other cases. If the evidence was competent, and the party had not in some manner estopped himself from giving the evidence then offered, his right was absolute. In other words, it was a question of legal right, not a question of practice, addressed to the discretion of the court. Was the defendant, then, by giving evidence tending to show title to the *locus in quo* in the state, precluded as by an estoppel from alledging that the water was taken in pursuance of the laws of the state, by the direction of the acting canal commissioner, for a temporary supply of water for the state canal? In *Winchell v. Latham*, (6 *Cowen*, 682,) which was an action upon a promissory note, in which the principal question was as to the consideration of the note, and the plaintiff had insisted, and given evidence tending to prove, that the note was given upon a pecuniary consideration, and in doing so had rendered himself guilty of subornation of perjury if his claim in that behalf was untrue, it was held that he was not at liberty to submit it to the jury to say whether the note was not given upon another and entirely different consideration, and in relation to which there was no evidence except his own declaration, called out by the defendant, with a view to oppose the case made on the part of the plaintiff. That case was very peculiar, and not at all analogous to this; and in that without resting their decision solely on the ground of estoppel, the court sustain their views upon that branch of the case by the analogy which was supposed to exist

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between that case and the class of cases in which it had been held that when the consideration is set forth in a written contract, evidence to show that a greater or different consideration was intended was not admissible, and they refer to 1 *John. Rep.* 139 ; 3 *Id.* 506 ; 7 *Id.* 341 ; and 2 *Wm. Bl.* 1249. It will be seen by reference to the case itself, that neither the principle decided or the reasoning of the judge by whom the opinion was pronounced can affect the question in this cause. Reference is also made to the opinion given by this court when this case was before us on a former occasion. The suggestion which was then made had reference to a supposed possible estoppel *in pais*, growing out of the acts of the defendant at the time of the taking of the water, and not to the question now before us ; and no expression or intimation of an opinion was given even upon the question suggested. In pleading, defenses apparently inconsistent are allowed to be interposed by separate pleas ; as in assumpsit, non-assumpsit, infancy, a release, and the statute of limitations ; in covenant, non est factum, a discharge by bankruptcy, and the statute of gaming or usury ; in trespass, not guilty, and a justification, and accord and satisfaction may be pleaded together : so not guilty and son assault demesne ; so a license and justification ; so not guilty and liberum tenementum ; and so of several other defenses which would be obnoxious to the objection taken in this action. (1 *Ch. Pl.* 562. *Bac. Ab. Pleas*, K. 3. 11 *John.* 196.) Had the defendant pleaded specially, first, title in the state and entry under authority from the state, and secondly, that the entry was made by authority of law and under the direction of the canal commissioners, and the water taken for the purpose of a temporary supply of water to the Erie canal, no valid objection could have been taken to the pleas for inconsistency ; and if not, then no objection could have been taken to the proof of the defenses upon the trial. Whatever a party may aver upon the record, by plea, he may, if it is controverted, prove upon the trial. No copy of the pleadings has been furnished, for the reason that no question arises upon them. In this action the evidence, if competent at all, was competent in favor of this defendant under the general issue, but it is not

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for that reason any the less competent than it would have been had it been specially pleaded. There was nothing in the character of the defenses, or in the conduct of the defendant upon the trial, which should have precluded him from the defense. Indeed I see no necessary inconsistency between the defenses. They may both be true. The state may have been the owners of the land and water, and the latter may have also been taken by the officers for a temporary purpose, and under circumstances which would have protected them in entering upon the premises of the plaintiff and taking the water for the purposes named. The water was clearly taken for temporary not permanent use, and neither the commissioner or superintendent were called upon to decide upon the validity of the title of the state at their peril, but might appropriate the water, as by law they had a right to do if it was the property of an individual, leaving the party to seek his remedy under the statute if the title was in him. Upon the trial of an action for the trespass, the state officers might not only show this appropriation, but they might also show that the plaintiff had no title.

The second ground upon which the decision of the judge in the exclusion of the evidence was based is also, in my judgment, untenable. The offer was sufficiently comprehensive to embrace every fact required by the statute under which the water might have been taken by the canal commissioners for a temporary purpose. The case of *Lynde v. Stone*, (4 Denio, 356,) decides this point, and goes further than it is necessary to go in this case. The decision in that case was that a canal commissioner might justify taking the waters of a stream for the temporary use of the canal, though he declared, when the diversion was made, that the water taken belonged to the state and that he did not act under the statute authorizing the taking of water for a temporary supply. If a canal commissioner could justify under such circumstances, then the superintendent of canals, acting under him and by his authority, would be justified under the same circumstances. And if justified when expressly disclaiming to act under the statute, then *a fortiori* the want of any claim, or any assertion, would not preclude a defense under the

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statute, and prohibit the party from showing that he acted in pursuance of its authority. A reference to the statutes upon this subject will show that it is nowhere made incumbent upon the canal officers to give notice of the authority under which they act, or to proclaim that they are acting under that particular statute, and taking water, the property of an individual, for a temporary purpose. (1 R. S. 227, §§ 58, 59. Stat. 1833, p. 261, §§ 1, 2; 1836, p. 407, §§ 10, 11.)

For the exclusion of the evidence offered, and without considering the other questions made, a new trial must be granted; costs to abide the event.

[JEFFERSON GENERAL TERM, July 7, 1851. *Pratt, Gridley, Allen and Hubbard, Justices.*]

DUNCKLE vs. KOCKER.

In a complaint charging a trespass by the defendant's horses on the plaintiff's land, and alledging by way of aggravation, the kicking and breaking the collar bone of the plaintiff's horse, it is not necessary to aver that the defendant's horses were accustomed to kick, or that the defendant had notice of the vicious propensity.

On the trial of a cause in a justice's court, and after the parties had rested, and while the counsel were summing up, a witness was permitted to be recalled, notwithstanding the defendant's objection, to state how he swore, in relation to a particular fact to which he had been examined. *Held not to be error.*

Whether a witness shall be recalled, or not, after the parties have closed their proofs, rests in the sound discretion of the court.

When there is no material defect in the proof, the court ought not to disturb the judgment of the court below, for a difference of opinion on the weight of the evidence.

THIS action was commenced in September, 1849, before a justice of the peace of Montgomery county. The complaint alledged that the defendant's horses, in September 1848, jumped over a division fence between the adjoining lands of the parties,

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or broke into the plaintiff's lot and trod down the grass, &c. and while thus trespassing, one or both of the horses of the defendant kicked or otherwise broke the collar bone, or other bone in the fore shoulder of the plaintiff's horse, and so lamed and crippled him, as to make him of little or no value, to his damage of \$100.

The defendant denied all the plaintiff's allegations.

On the trial, it was proved that the plaintiff's horses were, in August, 1848, hopped together and pasturing in the plaintiff's lot. The defendant's horses were seen in the same pasture, about 10 A. M., near the plaintiff's horses. The defendant's horses had been pasturing in an adjoining lot of the defendant. Shortly after seeing the horses so near together, the witness passed over a hill out of sight, and heard a noise as if the horses were fighting. Soon after this, the plaintiff went after his horses, and found one of them injured, and the right shoulder broken. There were marks on the shoulder as if marked with a shoe. The value of the horse before the injury was estimated by one witness at 70 or 75 dollars, and by two at 100 dollars. After the injury, he was shown to be of no value. The horse which was hurt was hopped on the right side of the other horse, and the injury was on the right shoulder of the horse. After the testimony was closed, and while the counsel were summing up the cause, a dispute arose as to a part of the testimony of Dunckle, one of the witnesses. The plaintiff's counsel proposed to recall the witness and to show that he testified as he had stated in his argument. This was objected to by the defendant's counsel, but the court permitted him to be recalled and examined; and he testified in the manner the plaintiff's counsel insisted he had previously testified, and as the justice certified he had before testified, on his first examination. The defendant's counsel excepted to the decision. The justice gave judgment for the plaintiff for damages \$91.50, and the defendant appealed to the county court. That court affirmed the judgment of the justice, and the defendant appealed to this court.

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T. B. Mitchell, for the appellant.

P. G. Webster, for the respondent.

By the Court, WILLARD, P. J. The main fact, that the plaintiff's horse was injured in the right shoulder, so as to destroy its usefulness, was proved beyond a doubt. The plaintiff's horses were shown to have been so fastened together, that one could not have kicked the other on its opposite side. The defendant's horses were wrongfully in the plaintiff's lot, and near the plaintiff's horses. There was evidence from which the justice might well infer that the horses fought, and that this injury was inflicted by one of the defendant's horses. The probabilities were all on that side of the question. A strange horse would be more likely to kick and fight than the companion to which the horse was fastened. Moreover, the latter could not have kicked the other in the place where he was injured. There were no other horses shown to be in the field but the defendant's, and they were wrongfully there. There was no defect in the proof; and in my judgment the justice drew the correct conclusions from the facts. Perhaps the court could not have reversed the judgment had the justice found the other way. When there is no material defect in the proof, the court ought not to disturb the judgment of the court below for a difference of opinion in the *weight of the evidence*. (See 21 *Wend.* 305; 18 *Id.* 141; 2 *Sandf. S. C. Rep.* 222; 5 *Barb. S. C. Rep.* 263; 6 *Id.* 141.)

It was not necessary in this case to alledge and prove that the defendant's horse was accustomed to fight and kick, or to prove a *scienter*. The declaration was for breaking and entering the plaintiff's close, and the injury to the plaintiff's horse was alledged in aggravation of the trespass. This was sufficient. (*Van Leuven v. Lyke*, 1 *Comst.* 515.)

Nor was there any error in permitting a witness to be recalled, after the counsel had commenced summing up the cause. Whether a witness shall be recalled or not, is a matter resting in the sound discretion of the court. (*Law v. Merrills*, 6 *Wend.* 276, *per Walworth, Ch.* *The People v. Mather*,

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4 *Wend.* 246. *Coven & Hill's Notes*, 711, 788.) In this case he was recalled to say how he had testified on a given point, and not for the purpose of opening his examination at large. It is plain from the return of the justice, that the witness testified on his primary examination, in the same way as he did when recalled, and not different. No injustice was therefore done to any body by recalling him.

On the whole, we think the judgment of the justice was right. The judgment of the county court in affirming it was right, and should be affirmed.

[Essex General Term, July 7, 1851. *Willard, Hand and Cady*, Justices.]

ADAMS vs. RIVERS.

Where the complaint, in a justice's court, is so drawn that the defendant can set up title in his answer, and on giving the requisite security oust the justice of his jurisdiction; but he omits to set up title, the justice retains his jurisdiction, and the defendant will be precluded from drawing it in question, on the trial.

The owner of a village lot bounded by a street is *prima facie* the owner, to the centre of the street.

When an entry, authority or license, is given to any one by law, and he abuses it, he is a trespasser *ab initio*; but when the entry, authority or license is given by another, and the party abuses it, he may be punished for the abuse, but will not be a trespasser *ab initio*.

In order to make a man a trespasser *ab initio* when the law has given the entry, &c., the acts of abuse must be of such a character as to be the subject of a trespass, if there were no license.

An act of omission, or words of vituperation merely, will not make a man a trespasser *ab initio*.

A person is a trespasser who, instead of passing along on the side walk of a street, stops on it, in front of a man's house, and remains there, using towards him abusive and insulting language.

THIS action was brought in a justice's court, in March, 1849, by summons. The plaintiff declared, for that he was in possession of the premises bounded by streets on two sides, and

11 390
63h 578
11 390
67h 308
11 390
71h 456
11b 390
153a 431

11b 390
89 Mis* 52

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that he was in the constructive possession to the centre of each street, subject only to a public easement; that the defendant wrongfully came upon the side walk of the plaintiff, and there remained, using offensive, vulgar and vile language towards the plaintiff, and refusing to depart. The second count describing another lot in his possession, bounded on another street, with buildings and piazza thereon; and alledging that the defendant wrongfully came upon the plaintiff's side walk of that lot, and upon his piazza, on divers days, and remained thereon, using low, vulgar, vile, and abusive language towards the plaintiff, and refusing to depart.

And in a third count it was alledged that on the first day of May, 1848, and on divers days thereafter, the defendant wrongfully broke and entered another close of the plaintiff's, remained there a long time, treading about upon his side walk, and upon his piazza, using offensive and abusive language towards plaintiff, in all, to his damage of fifty dollars; which complaint was verified, &c. The defendant's answer denied the entry, or that the plaintiff was in the constructive possession to the centre of the streets, or the side walks first mentioned in the complaint; denied that the boundaries of the lot extended to the centre of the street; denied the unlawful entry upon the premises, side walk and piazza; or that he wrongfully remained there. It also denied the plaintiff's actual or constructive possession of side walks and streets to the centre; denied the wrongful entry, or remaining upon the side walks or piazza and abusing the plaintiff after having been directed to depart; alledged that if the defendant entered upon the side walks and piazza, he had license from plaintiff; and denied the abusive language, and alledged that it was better than plaintiff deserved. The plaintiff's replication objected to the defendant's answer being received without the written undertaking, &c. according to title six, part first, of the code. It also objected to that part being received which denied that the boundaries of the lot first mentioned extended to the middle of the streets, and denied that the plaintiff was owner of the street opposite said lot, without the undertaking referred to under the first objection. The replication

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also insisted that that part of the defendant's answer which alleged if he entered, he had the plaintiff's license, was defective and a nullity, for not admitting the entries, &c. And the plaintiff further replied, denying the defendant's license to enter, &c.

The cause was tried by a jury. The plaintiff proved his cause of action substantially as stated in his complaint, and rested, when the defendant moved for a nonsuit, on three grounds. 1st. That by the plaintiff's own showing, the title to land was in question; 2d. That the plaintiff had failed to show possession of the *locus in quo*. 3d. That the *locus in quo* was a *public street*, and that the plaintiff had not proved any damages. The defendant also moved to strike out the testimony of the conversation and acts done by the defendant in the highways, complained of, which motion was denied. The defendant then gave evidence, effecting no material change of the case, when the cause was submitted to the jury, who found a verdict for the plaintiff for \$20 damages, upon which the justice rendered judgment.

The defendant appealed to the county court, which court, on the first day of January, 1850, reversed the judgment, on the grounds that evidence was received, under objections, on the trial, of the language and conversation of the defendant on the side walks of public streets, whereas no action could be maintained for such a cause. And also on the further ground, that title to lands came in question upon the plaintiff's own showing; which was disputed by the defendant, and which were the only grounds, as certified by the county judge. Upon which the plaintiff appealed to this court.

H. Adams, appellant, in person.

Mitchell & Ely, for the respondent.

By the Court, WILLARD, P. J. The complaint was so drawn that the defendant could have set forth in his answer, any matter showing that title would come in question, and thus by

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giving the requisite security, oust the justice of jurisdiction. He failed to do so, and therefore the justice retained jurisdiction of the cause, and the defendant was precluded in his defense, from drawing the title in question. The county court reversed the judgment of the justice upon the ground that title to lands came in question upon the plaintiff's own showing, which was disputed by the defendant. The county court supposed that the case fell under the 59th section of the code. In this the court was mistaken. If the title to land was brought in question at all, it appeared on the face of the complaint. The defendant having failed to take that objection at the joining of the issue, and to give the required security, was precluded from raising it as a defense on the trial. The 59th section is applicable only to those cases where the defendant was not apprised, by the nature of the action, that title would be in question, and where it first appears by the plaintiff's own showing, on the trial, that it is in question. In such case, if the defendant disputes the title, the justice is required to dismiss the action.

The plaintiff proved, *prima facie*, that he owned and possessed both the lots mentioned in the complaint. These lots being bounded by public streets, extended to the centre of the street. This is undoubtedly the legal presumption. In *Adams v. The Saratoga and Washington Railroad Co.* just decided by this court, (a) all the leading cases are collected. (2 *Kent's Com.* 433. 2 *John.* 363. 1 *Wend.* 270. 2 *Id.* 473. 8 *Id.* 106. 11 *Id.* 486. 4 *Paige*, 513. 12 *Wend.* 98. 15 *John.* 447. 2 *Smith's Leading Cases by Hare and Wallace*, 173, and note. 2 *Str.* 1004.) I shall assume that to be the law, without a more extended review of the cases. As was well remarked by Justice Cowen in *Pearsall v. Post*, (20 *Wend.* 121,) the relative rights both of owner and passenger in a highway, are well understood and familiarly dealt with by the law. Subject to the right of mere passage, the owner of the soil is still absolute master. The horseman can not stop to graze his steed, without being a trespasser; it is only in case of inevitable, or at least

(a) See post, 414.

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accidental detention, that he can be excused even in halting for a moment.

This brings us to the main question in the case, whether the defendant by using abusive and insulting language to the plaintiff, became a trespasser from the beginning. The testimony authorized the jury to find that the defendant came on to the premises of the plaintiff, covered by the street, not in the legitimate use of the highway as a place of travel, but for the express purpose of abusing him. The opprobrious language used by the defendant was not actionable as slanderous. It was highly provoking and tended directly to a breach of the peace. It was received in evidence merely to show that the defendant was a trespasser, having forfeited his privilege by a gross abuse of it; and not indirectly to recover damages before the justice, for actionable words. It is conceded that the justice had no jurisdiction of an action of slander.

The general doctrine as laid down in *The Six Carpenters' case*, (8 Co. 146, a,) is that when an entry, authority or license is given to any one by the law, and he doth abuse it, he shall be a trespasser *ab initio*: but when an entry, authority or license is given by the party, and he abuses it, then he must be punished for the abuse, but shall not be a trespasser *ab initio*. In accordance with this distinction, it is held that if a man enter an inn or tavern, and subsequently commits a trespass; if the lord who distrains for rent, or the owner for damage feasant, works or kills the distress; or if he who enters to see waste, breaks the house, or stays there all night; or if the commoner cuts down a tree, in these and the like cases the law adjudges that he entered for that purpose; and because the *act which demonstrates it is a trespass*, he shall be a trespasser *ab initio*. (*Six Carpenters' case, supra.*)

In all the cases put by Coke, the acts complained of as abuses of the power, were distinct acts of trespass. And it seems to be the better opinion that a man can not become a trespasser *ab initio*, by any act or omission, which would not itself, if not protected by a license, be the subject of trespass. Thus in *Shorland v. Govett*, (5 B. & C. 485,) the sheriff's officer

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justified a trespass under a *fi. fa.*, and it was held that a demand by the officer of more than was due by the warrant, did not make him a trespasser from the beginning. The reason is, that the original levy was lawful, and extortion is not an act for which trespass will lie. In *Gates v. Lounsbury*, (20 *John*. 429,) Spencer, Ch. J. says, that where an act is ~~lawfully~~ done, it can not be made illegal *ab initio*, unless by some positive act incompatible with the exercise of the legal right to do the first act. And the same learned judge in *Gardiner v. Campbell*, (15 *John*. 402,) recognizes the distinction in *The Six Carpenters' case*, between the *actual and positive* abuse of a thing, taken originally by authority of the law, and a mere *nonfeasance*, such as a refusal to deliver an article distrained. And Bronson, J. affirms the same principle in *Hale v. Clark*, (19 *Wend*. 498,) that a mere nonfeasance will never make a man a trespasser from the beginning; some act is required to be shown. The same doctrine is recognized by elementary writers. (2 *Leigh's N. P.* 1445. 2 *Phil. Ev.* 197, 198. 1 *Smith's Leading Cases*, by *Hare and Wallace*, 165, 166.)

The case of *Adams v. Adams*, (13 *Pick.* 384,) establishes the doctrine that the *omission* of a distrainer, to afford proper food and water to distrained cattle, made the distrainer a trespasser from the beginning. And in *Bond v. Wilder*, (16 *Verm. R.* 399,) the *neglect* of an officer to sell goods advertised under an execution, in pursuance of his advertisement, was held to work the same consequence. Both these cases are believed to be a departure from the English law, and they certainly are not in harmony with the New-York cases.

Savage, Ch. J. in *Allen v. Crofoot*, (5 *Wend.* 509,) does not admire the distinction taken by Coke between the abuse of a license granted by law, and a license granted by the party. And he thinks a better reason was given for it in Bacon's Abridgment, title Trespass B. Where the law has given an authority, it is reasonable that it should make void every thing done by the abuse of that authority, and leave the abuser as if he had done every thing without authority. But where a man, who was under no necessity to give an authority, does so, and the

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person receiving the authority abuses it, there is no reason why the law should interfere to make void every thing done by such abuse; because it was a man's folly to trust another with an authority who was not fit to be trusted therewith.

No case has been cited showing that a man will forfeit a license granted by law, by the use of vituperative language; and none such have fallen under my notice. In all the cases, except *Adams v. Adams* and *Bond v. Wilder*, some positive act, such as if done without authority would be a trespass, has been held essential to make the party a trespasser *ab initio*. These cases may have been decided upon local statutes.

It is quite clear that the uttering abusive language was not an act for which the plaintiff could maintain trespass against the defendant. Had such language been uttered in an inn by a guest to the landlord, it would have afforded just cause for the latter to expel the former. So doubtless in *The Six Carpenters' case*, their refusal to pay for their room, though it did not make their original entry unlawful, would have justified the landlord in ordering them to depart. (*Story on Bail*. 484.)

The right of an innkeeper to refuse to receive a guest, or to order him to depart, rests on reasons peculiar to that relation. (*Id.* 484.) An innkeeper is bound to receive all travelers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be received. (3 *Barn. & Ald.* 283.)

"A highway," says Swift, justice, in *Peck v. Smith*, (1 *Conn. Rep.* 132,) "is nothing but an easement, comprehending merely the right of all the individuals in the community to pass and repass, with the incidental right in the public to do all the acts necessary to keep it in repair. This easement does not comprehend any interest in the soil, nor give the public the legal possession of it." In this state, since the adoption of the revised statutes, the public, under certain circumstances, may have a qualified right of pasturage, by certain animals, at certain seasons. (*Griffin v. Martin*, 7 *Barb.* 297.) The use of the highway, by any person for any purpose other than to pass and repass, is a trespass upon the person who owns the fee of the

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road. (1 *New-Hamp. Rep.* 16. *Babcock v. Lamb*, 1 *Cowen*, 238. *Jackson v. Hathaway*, 15 *John.* 447.) But no act will amount to a trespass unless the same act would be a trespass if committed on any other land of the plaintiff. Language, however licentious and abusive, is not a trespass, within the appropriate meaning of that term. Nor can a party be made a trespasser upon the freehold of the adjoining owners of the soil, by the uttering of abusive language as he passes along the road. A person who disturbs the public peace as he passes along the road, by singing obscene songs and using boisterous and obscene language, may be liable to be punished at the suit of the public, for a breach of the peace; but he is not liable in trespass at the suit of the adjoining owners. These acts, however censurable, are not acts of *trespass*.

The foregoing remarks show that if the action was sought to be maintained on the ground that the defendant became, while passing on the road, a trespasser from the beginning, by reason of his abusive language to the plaintiff, the action can not be maintained. The county judge must have taken this view of the case: for one of the reasons for the reversal is that evidence was received by the justice, under objections, of the language and conversation of the defendant on the side walks of public streets, and in his judgment no action could be maintained for that cause. It is presumed that the county judge supposed that the abusive language was proved, not as a substantive cause of action, but as showing that the defendant had forfeited his right to be in the highway on the plaintiff's premises; in short that he was a trespasser *ab initio*, by reason of his abusive conduct.

But there was another view of the case which seems to have been overlooked. The defendant had no right to be upon the plaintiff's piazza after he was ordered to depart. Perhaps he had no right to be there at all. That was a distinct act of trespass. The language of the defendant while committing a trespass was proper to qualify the act, and show with what spirit it was done. (*Merest v. Harvey*, 5 *Taunt.* 442.)

The defendant also committed a trespass while standing on

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the side walk by the plaintiff's lot where he lived, and using towards him abusive language. While so engaged he was not using the highway for the purpose for which it was designed, but was a trespasser. He stood there but about five minutes. It was not shown that he stopped on the side walk for a justifiable cause; on the contrary, it was rendered probable that it was for a base and wicked purpose. It was, therefore, a trespass. Suppose a strolling musician stops in front of a gentleman's house, and plays a tune or sings an obscene song under his window, can there be a doubt that he is liable in trespass? The tendency of the act is to disturb the peace, to draw together a crowd, and to obstruct the street. It would be no justification that the act was done in a public street. The public have no need of the highway but to pass and repass. If it is used for any other purpose not justified by law, the owners of the adjoining land are remitted to the same rights they possessed before the highway was made. They can protect themselves against such annoyances, by treating the intruders as trespassers.

The action therefore was strictly supported by the evidence. The jury were not limited to mere compensatory damages, and the court could not have interfered, had the recovery been five times as much as it was. (*Merest v. Harvey*, 5 *Taunt.* 442. *Cook v. Ellis*, 6 *Hill*, 465. *Hitchcock v. Whitney*, 4 *Denio*, 461.)

The judgment of the county court must be reversed, and that of the justice affirmed.

[Essex General Term, July 7, 1851. *Willard, Hand and Cady*, Justices.]

**ARCHIBALD REID, by Peter J. McKinlay, his committee, vs.
NOAH FITCH and others.**

Where the committee of a lunatic purchases real estate and takes the conveyance to himself, in violation of his trust, and pays the consideration with money belonging to the lunatic, a trust results in favor of the lunatic; and this trust is retained by the 1 R. S. 728, § 53, and is turned into a legal estate by the 45th section of the same article; (1 R. S. 728, § 45;) and it is liable to be sold on execution; and descends to the heir at law, if not otherwise disposed of.

A resulting trust may be proved by parol.

THIS was an action to recover the undivided half of about thirty-five acres of land, situate in the town of Johnstown, in the county of Fulton. The plaintiff's title was derived by descent from his mother Catherine Reid. It was proved that in 1835 the said Catherine Reid was found a lunatic, by inquisition, and Thomas Reid was duly appointed by the court of chancery, committee of her person and estate. As such committee, he received, on the 1st of December, 1836, the arrearages of a pension from the United States, belonging to said lunatic, amounting to \$3300 at one time, and about \$600 more at subsequent times; and in December, 1836, he purchased the land now sought to be recovered, and paid the purchase money, \$1800, out of the aforesaid money belonging to the lunatic, and took a conveyance to himself absolutely. On the 10th of January, 1838, the said Thomas Reid, as such committee, made a report to the court of chancery, in writing and under oath, in which he acknowledged the above facts, and stated that Archibald Reid (son of the said Catherine) was incapable of providing for himself and had no property of his own, but that in case he should survive the said Catherine Reid he would be entitled to such property as might belong to her at the time of her death, unless she should recover from her lunacy and dispose of her property by will.

Catherine Reid died in 1830, intestate, having continued a lunatic till her death, and leaving the plaintiff one of her heirs at law, he being entitled as such to one half of her estate, by descent. She left also other heirs, not parties to this suit, to whom the other moiety descended.

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In July, 1841, Daniel Edwards, one of the defendants and brother-in-law of Thomas Reid, the committee of Catherine Reid, with full knowledge of the foregoing facts, took a mortgage from the said Thomas, covering the said land, to secure the payment of an old debt which the said Daniel had against the said Thomas, for about \$850. This mortgage was foreclosed under the statute in 1847, and the premises were bid off by John Edwards, one of the defendants, and father-in-law of Thomas Reid the committee, with full knowledge of all the facts. The premises were worth at the time of the sale about \$1800, or \$2000, and were bid off for about \$700. The defendant Noah Fitch was in possession as tenant of John Edwards at the time of the commencement of this suit. Before the commencement of the suit, possession was demanded of the undivided half of the premises for the plaintiff, which was refused, and John and Daniel Edwards were respectively required to release to the plaintiff their title to the premises, with covenants against their acts. This they refused to do.

It was admitted that Archibald Reid, the plaintiff, was a lunatic, and that Peter J. McKinlay was duly appointed his committee. It was proved that Thomas Reid, a short time before he was appointed committee, was discharged from his debts under the two-thirds act. John Edwards was one of his petitioning creditors, and Daniel Edwards was his assignee. There were other facts admitted by the pleadings or proved on the trial, not necessary to be stated in this place. The relief demanded by the complaint was the possession of an undivided half of the premises, and a quit-claim deed from the defendants, John and Daniel Edwards, with covenants against their acts, together with damages for the detention of the premises.

The defendants' counsel insisted, 1. That the plaintiff had not shown a legal title to the land in dispute. 2. That if a trust resulted on the purchase of the premises in question by Thomas Reid, with the pension money of Catherine Reid, it resulted in favor of Daniel Edwards, as a creditor of Thomas Reid, who it was to be presumed applied the moneys advanced to him by Edwards towards the support of Mrs. Reid. 3. That there was no

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resulting trust. 4. That if the plaintiff had any legal or equitable interest in the premises in question, the defendants were entitled to a reference, to have the account between Thomas Reid, as committee of Catherine Reid, and the plaintiff, taken and stated, to ascertain whether any thing was due to the plaintiff. And the defendants' counsel asked a reference for that purpose.

Mr. Justice Paige, before whom the cause was tried, decided that on the purchase of the premises in question by Thomas Reid in his own name, with the pension moneys belonging to Catherine Reid, a trust resulted in her favor, which trust, by the 45th section of the article of uses and trusts, was turned into a legal right, and that on the death of Catherine Reid the legal title descended to the plaintiff, Archibald Reid, and to the children of William Reid, as his heirs at law. And also, that if the defendants were entitled to have the account of Thomas Reid as committee of Catherine Reid taken and stated, and were entitled to any relief as against the premises in question, in case the estate of Catherine Reid should be found indebted to Thomas Reid, they must bring a separate action for that purpose, and file a complaint therein, in the nature of a bill in equity, and make all the persons interested in the estate of Catherine Reid parties to such action; that all the necessary parties to that suit were not parties to this action; and as there was no conflict as to the facts, and no question to submit to the jury, he directed a verdict for the plaintiff for the undivided moiety of the premises described in the complaint.

The defendants' counsel excepted to the foregoing decisions. The jury found a verdict for the plaintiff, and the defendants appealed from the judgment entered thereon.

J. Wells, for the appellants. I. The lunatic Catherine Reid did not take any right to the land; she took only a lien on the land. (2 *Story's Eq. 4th ed.* § 1195, and note to § 1210. *Atherley on Mar. Sett. ch. 28, pp. 443, 444.*)

II. If there be a trust it is merely by implication of law, and as such is not affected by the 45th section of the statute of uses

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and trusts. Hence Catherine Reid did not take a legal right in the land, as decided by the court. The legal estate was in T. Reid, as trustee, and passed by the mortgage sale to John Edwards. (2 R. S. 3d ed. 13, § 50. 14 Wend. 176. 1 Yerg. 1. 1 Cruise, tit. Trust, ch. 1, §§ 39, 47. 5 Denio, 225. 2 R. S. 134. 4 Kent, 309. 5 John. Ch. 1, 11.) The report of T. Reid is not a declaration of trust. Since the 2 R. S. 134, §§ 6, 7, it can have no effect, even if before it would have been sufficient as a declaration. The cases cited on the other side were under the former statute.

III. No action lies against the trustee, in favor of the heir. The land, having been bought with the trust funds, will be treated in equity the same as the money. It will go to the personal representative and not the heir. (1 Cruise, tit. 15, Trust, ch. 1, § 48. *Id.* tit. 12, ch. 4, § 9. 2 Story's Eq. § 1259. 2 John. Ch. Rep. 1. 1 Vernon, 435, 100, 192. 2 Kent's Com. 230. 3 Yenger, 77.) An administrator converted personal estate into land. The next of kin was a minor and died under age. His heirs claimed the land. His administrators filed a bill against the heirs and the administrator of the father. The court say, "The administrator has no power to convert personalty into realty, and if it be done, the real property will be considered in equity as personalty, and distributed accordingly." In 1st Vernon, 435, the facts were similar, and the court ordered the trustee to account to the administrator of the minor. (2 Vern. 192. 2 Kent, 230.) The above are cases where the trustees bought the land in good faith and expressly for the *cestui que trust*. The same principles will hold more strongly in cases like the present, where the trustee bought the land for himself, in his own name, and in violation of his trust. It can make no difference, according to the above cases, whether the trust is express or implied: in either case the land would go as personal estate to the administrator. When a trustee misapplies the trust funds for his own benefit, the *cestui que trust* can call him to an account for such funds, and insist upon its repayment in money the same as of any other debt or claim, or she can if she elects so to do, have a decree for the land purchased with the

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funds. She has no interest, equitable or otherwise, in the land till she elects to take it, and her right so to do is merely an equitable incident to her claim and demand against the trustee. (2 *Story's Eq.* § 1262, note to § 1210; 3 *How. Sup. C. Rep.* 1 *John. Ch.* 450, 581. 2 *Id.* 441, 444, 445.) Catherine Reid being a lunatic, could not make an election. The right to sue, or to call the trustee to an account for the trust moneys, passed to the personal representative. The land was but an incident to or a substitute for the money. From the lapse of time it is to be presumed that T. Reid had accounted with and paid up the trust funds to the administrator. There is nothing in the case showing otherwise. (2 *R. S.* 296, 301.)

IV. The trustee should be allowed his commissions, expenditures, &c. for the support of Catherine Reid, also of Archibald Reid, the plaintiff. Hence an accounting should be taken, to ascertain what such expenditures are.

V. No cause of action was made out as against D. Edwards. The complaint should have been dismissed as to him, with costs.

VI. Nor against Noah Fitch, who has taken a lease in good faith and without notice. (1 *Cruise, tit.* 12, *ch.* 4, §§ 10, 11.)

VII. The cause should have been left to the jury.

VIII. T. Reid did not receive the pension moneys as the committee of Catherine Reid, but as her agent, &c. under her power of attorney. Hence, so far as these funds are concerned, he is simply a debtor to Catherine Reid. The cases do not go the length of fastening a trust on the funds in the hands of an agent or attorney, or on the property which he may have bought with them. Two conditions must exist in cases like the present before equity will fasten a trust on the land. The first is, that the trustee should be in default and retain the trust funds, or part of them, and such funds have been converted into the land. If the committee has expended, in pursuance of his trust and for the support of the lunatic Catherine Reid and of the plaintiff, the full amount of what has been received by him, with the interest and profits thereof (as the defendants insist he has done) that is all that can justly be required of him. If an executor, committee, or other trustee has \$1000 in his hands, and with

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\$500 of it he buys a farm for himself, but yet goes on with the trust and pays out the full amount of the \$1000, with the interest and profits in accordance with the will or the requirements of his trust, surely equity will not take away the farm from him and give it to the *cestui que trust*, who has already had the full amount to which he is entitled. It can make no difference with what precise funds the trust is performed, provided it be substantially and in reality fulfilled. If, however, the trustee be in default for the funds, then the *cestui que trust* can elect to have the land in place of the funds, but not otherwise. Hence the committee, T. Reid, should have been made a party and called to an account, or at least it should have been shown that he was in default and kept back the trust funds. Nothing of the kind is shown, or even alledged. The fair presumption, from lapse of time and other circumstances, is that he has settled the account with the administrator. The judge erred in holding that Catherine Reid took the legal title to the land, and that such title descended as real estate to the plaintiff as heir, and that in order to have an account, the defendants must bring a separate action against the heirs &c. of Catherine Reid. That decision shut the defendants out from every possible defense.

The second condition is, that the trustee being in default and having converted the funds into land, the *cestui que trust* or the one entitled to the funds shall elect to take the land in place of the funds. (*See cases cited under the 3d point.*) Catherine Reid not having made and being unable to make an election, her right to call the committee to account, and compel him to pay over the funds, or else to take the land instead, passed to the administrator, the same as the money would have done had it not been converted into land. Even if the trust be considered as attaching to the land the instant of the purchase, or even if it be an express trust, still in equity it is personalty and goes to the personal representative, the same as the money would. The land is merely a substitute for, and incident to, the right to the funds, and passes with it to the administrator. (*See cases before cited.*) Hence the plaintiff has no rights as heir at law. It is only as next of kin, entitled to his distributive share on

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settlement of the personal estate, that he is interested. As such, however, he can not maintain this action. He is but one of several next of kin. The right to the election can not go to him. The next of kin can only act on the estate through an administrator. The personal estate does not descend to the next of kin like the realty to the heir. It goes to the administrator, in whom the title vests, and who alone can bring actions on claims belonging to the estate of the intestate. The next of kin gets all his rights under the statute of distributions, and for them must look to the administrator, &c.

F. McIntyre, for the respondent. I. The deed to Thomas Reid in Dec. 1836, and the declaration of trust of Thomas Reid, vested the estate in Catherine Reid absolutely. And her title to an undivided half descends to the plaintiff. (1 *R. S.* 722, § 49, 2d ed. 1 *Cruise's Dig.* 421, *tit. Trust, ch. 1*, § 36, n. 115, 4th Am. ed. *Burrett v. Joy*, 16 *Mass. Rep.* 221; *Fisher v. Fields*, 10 *John.* 505. 4 *Kent's Com.* 298. *Provost v. Gratz*, 1 *Peters*, 336. *Rutledge v. Smith*, 1 *McCord's Ch. Rep.* 119. 2 *P. Wms.* 414. 6 *Cowen*, 725.) If before the revised statutes this declaration of trust would have given Catherine Reid as *cestui que trust* a beneficial interest in the land, it would since the revised statutes give her a legal estate therein of the same quality and duration as her beneficial interest (1 *R. S.* 722, §§ 45, 47, 2d ed.)

II. If the estate did not vest absolutely in Catherine Reid by virtue of the declaration of trust, then on the purchase of the premises in question in his own name by Thomas Reid, with moneys belonging to her, a trust resulted to her. (1 *R. S.* 722, §§ 51, 52, 53, 2d ed. 1 *Cruise*, 422, *tit. Trust, ch. 1*, § 47.)

III. This resulting trust under the revised statutes is a legal right cognizable as such in the courts of law of this state. And the *cestui que trust* was entitled to the possession of the land and the receipt of the rents and profits thereof. 1 *R. S.* 721, §§ 45, 47, 2d ed. *Wait v. Day*, 4 *Denio*, 439. 3 *John.* 216. 10 *Id.* 199. 11 *Id.* 97. 2 *Wend.* 134. 7 *Id.* 379. *White v. Carpenter*, 2 *Paige*, 238. 1 *R. L.* 72, § 1.)

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IV. If however the court shall be of opinion that this is a resulting trust, and that prior to the code the plaintiff's right could be enforced only in a court of equity, then the decision of the judge, so far as it was in favor of the plaintiff, was right, although the reason given may have been wrong. The case made by the complaint and the proof would in equity have entitled the plaintiff to a decree against the defendant for possession of and a conveyance of the land. The judge directed judgment in favor of the plaintiff for possession of the land, but did not order the defendants to convey. His decision thus far was such as would have been made by a court of equity, and the plaintiff alone could complain that the defendants were not also ordered to convey. (*Pebbles v. Reading*, 3 Serg. & R. 484.)

V. The right of Catherine Reid descended to her heirs at law, and the plaintiff as one of such heirs became entitled to possession of one half the land.

VI. The defendant showed no right to have the account of Thomas Reid with the estate of the lunatic taken and stated in this suit. Even if Catherine Reid's estate is indebted to Thomas Reid, he has not assigned his claim to the defendants or either of them. The mortgage to secure his individual debt only conveyed his interest in the land to Edwards. It does not give Edwards any right against Reid or his property. It does not appear that there is any covenant on the part of Reid to pay Edwards, or any bond accompanying the mortgage.

VII. If the defendants wish to reach this land, they must first get a judgment against Thomas Reid : if the execution be returned unsatisfied they may then compel him to make an assignment to a receiver. If it then turns out that he has a claim against the estate of the lunatic, his receiver must proceed against the administrator of the deceased, or against her heirs. In no other way can Edwards obtain an interest in the plaintiff's share of this land.

By the Court, WILLARD, P. J. At the time the revised statutes were adopted, it was well settled that where land was purchased in the name of one person and the consideration was

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advanced by another, a trust resulted in favor of the person who advanced the consideration. (*Jackson v. Morse*, 16 *John*. 197. *Foote v. Colvin*, 3 *Id.* 216. *Jackson v. Sternbergh*, 1 *John. Cas.* 153. *Botsford v. Burr*, 2 *John. Ch.* 409. 3 *Story's Eq.* § 1201. *Cruise's Dig. tit.* 12, *ch.* 1, § 42, *of Trusts.*) For reasons unnecessary to be mentioned here, this rule was abrogated, except in favor of the creditors of the party advancing the consideration, to the extent that might be necessary to satisfy their demands. (1 *R. S.* 728, §§ 51, 52.) And except by the 53d section, "when the alienee named in the conveyance, shall have taken the same as an absolute conveyance, in his own name, *without the consent or knowledge of the person paying the consideration, or when such alienee, in violation of some trust, shall have purchased the lands so conveyed, with moneys belonging to another person.*" The latter clause in terms covers the present case. Thomas Reid, the alienee, made the purchase and took the deed to himself, in violation of his trust, and he paid the consideration with money belonging to the lunatic, Catherine Reid. This resulting trust in favor of the lunatic is expressly retained by the revised statutes. The cases before cited show that such resulting trust might be proved by parol. But in the present case, it was not necessary to rely upon that principle. The report afterwards made by him to the court of chancery, in writing, and subscribed by him and verified by his oath, distinctly recognized and declared the trust. Such declaration is equally efficacious, as if made at the time. (*Per Sutherland, J. in Jackson v. Moore*, 6 *Coven*, 725, 6. 5 *John. Ch.* 12.) The 45th section of the same article, (1 *R. S.* 727,) abolished uses and trusts, except as authorized and modified therein; and enacted that every estate and interest in lands shall be deemed a legal right cognizable as such in the courts of law, except when otherwise provided in that chapter. The learned judge was right in holding that on the purchase of the premises in question by Thomas Reid in his own name with the moneys belonging to Catherine Reid, a trust resulted in her favor which the statute turned into a legal estate, and that on her death it descended to her heirs at law.

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I am aware that the chancellor intimated in *Brewster v. Power*, (10 *Paige*, 562,) that the land in which there is a resulting trust in favor of creditors can not be sold on an execution in favor of the creditors. But the case did not call for a decision of the question; and the contrary was expressly held by the supreme court in *Wait v. Wait*, (4 *Denio*, 439.) If the estate be a legal estate, by operation of the statute, it is subject to all the incidents of such estate. Before the revised statutes, such estate could be sold on execution against the *cestui que trust*. (*Foote v. Colvin*, 3 *John*. 216.) If it was a legal estate for that purpose, it must have a descendible quality, and must be recognized as a legal estate in a court of law.

The defendants are not protected by the 54th section, for they purchased with full notice of the trust, and without parting with any new consideration.

The learned judge did not decide that an equitable defense could be made to a legal demand, and that question does not properly arise in this case. It is manifest that the proper parties are not before the court to take an account between the heirs of Catherine Reid the lunatic and Thomas Reid the committee. The defendants did not ask leave to amend the pleadings in this action, nor that the case should stand over to add parties. It is therefore unnecessary to say whether the pleadings in this cause could have been so moulded as to take the desired account. Nor was there any question on which the defendant asked to go to the jury; nor was the judge asked to dismiss the action as to one or more of the defendants. The intimation that an account should be taken in a cross-action, in which all persons interested should be made parties, was a proper suggestion, and is hardly the subject of an exception.

On the whole I am satisfied that the cause was properly disposed of at the circuit.

Judgment affirmed.

[ESSEX GENERAL TERM, July 7, 1851. *Willard, Hand and Cady*, Justices].

HEWITT vs. WATKINS.

H. and W. were the owners of adjoining land. H. let his land lie open, and W. built the whole of the division fence between them. Afterwards H. enclosed his land. A dispute having arisen between the parties as to the value of said division fence and the proportion thereof which W. ought to pay to H., it was held, that the fence-viewers of the town, under 1 B. S. 353, §§ 30 to 36, had jurisdiction of the matter.

The decision of the fence-viewers, in such a case, should be reduced to writing and filed in the office of the town clerk; and when the dispute is as to *the value of the fence, and the proportion thereof which one party should pay to the other*, it should specify such sum, and an action will lie to recover the same. If the dispute relate only to *the value and sum to be paid*, and there be no dispute about the proportion of the fence to be maintained by each, the certificate is valid, although it is silent about the proportion to be maintained by each. It is enough that it disposes of the matter submitted to the fence-viewers.

IN October, 1848, Hewitt sued Watkins in a justice's court, for the amount found by the fence-viewers of the town of Charlton, in the county of Saratoga, to be due to him. The complaint stated that for several years past the plaintiff and defendant had been and still were the owners of land adjoining to each other, in Charlton; that the defendant suffered his land to lie open, and the plaintiff, in 1840, at his own costs and expenses erected the division fence between them. That since said erection, the defendant, in 1847, enclosed his land and had since kept it enclosed. That the plaintiff afterwards, in July, 1848, in pursuance of the statute made choice of one fence-viewer of said town, and gave the defendant the requisite notice of eight days to select another, or that he the plaintiff would select both, for the purpose of estimating the value of such division fence, and the proportion thereof to be paid by the defendant: that the defendant neglected to make such choice, and the plaintiff, after the expiration of eight days, made choice of another fence-viewer of said town, and the two so elected met and examined the premises and proceeded according to the statute, and estimated the value of said fence, at the time of its erection, at \$102, and the present value of one half and the proportion to be paid by the said Watkins, at \$38,25; which decision was reduced to writing by them and

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contained a statement of all necessary facts, and was by them duly filed in the clerk's office of the said town. That the defendant had due notice of the meeting of the fence-viewers. That he had not paid the \$38,25, or any part thereof, nor had he at any time paid any part of the expense of building said fence, but on the contrary refused. The plaintiff demanded judgment against the defendant for \$38,25, together with the fence-viewers' fees, and costs.

The answer denied every allegation in the complaint, and set up an accord and satisfaction on the 9th of October, 1847.

The plaintiff replied to the accord and satisfaction, and denied that it embraced the present claim, and alledged that the present cause of action accrued subsequent to that settlement. Issue was joined thereon. The cause was tried by jury on the 23d of October, 1848. On the trial it was proved that the lands of the plaintiff lay east of and adjoining a strip of land belonging to the defendant. The two pieces of land were bounded upon each other, for a distance of 102 rods. The defendant had been in possession of his for near thirty years, and the plaintiff in possession of his for about sixteen years. The defendant had let his land lie open till in May, 1847, when he enclosed it at the south end, next the road. While the defendant's lot thus lay open, and in 1840, the plaintiff erected a division fence on the line between him and the defendant. On the 12th July, 1848, the plaintiff notified the defendant in writing, that he had selected Francis H. Skinner, a fence-viewer, to apportion and appraise the division fence between them, and that unless the defendant selected one, in eight days, the plaintiff would select another. It did not appear that the defendant selected a fence-viewer, but it did appear that afterwards William Dreamer, another fence-viewer of said town, was associated with said Skinner, and that after giving the defendant personal notice of the day, hour and place of meeting of the fence-viewers, to apportion and divide the fence and appraise the damages, they met, inquired into the facts and examined the premises, and made their certificate in writing and subscribed the same on the 26th of August, 1848, and caused it to be filed in the town clerk's office of said

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town. The certificate recited that the parties were the owners of adjoining land; that the defendant had let his land lie open, and the plaintiff had built the division fence between them, and that the defendant had never enclosed his land, and that a dispute had arisen concerning *the proper proportion of the value of the said division fence to be paid for by said Watkins*. It then certified that they had made due inquiries into the facts, and had examined the premises, and they gave a description of the fence, and stated that the value thereof was one dollar a rod, or \$102 at the time it was built, which was in 1840; that the proper proportion of said value to be paid by said Watkins to the said Hewitt was \$38,25, that being the present value of one half of said fence, to wit, 75 cents a rod. They certified their fees at \$1,75, and subscribed the certificate.

On the part of the defendant there was evidence of the settlement of a trespass suit between the parties in Oct. 1847. There was no evidence that the present controversy was embraced in that settlement.

The jury found a verdict for the plaintiff for \$38,25, on which the justice gave judgment. The defendant appealed to the county court of Saratoga county, which court, on the 3d of July, 1850, affirmed the judgment of the justice. The defendant then appealed to this court.

J. Brotherson, for the appellant.

C. B. Cochrane, for the respondent.

By the Court, WILLARD, P. J. The first objection to the plaintiff's right of recovery was that the fence-viewers had not jurisdiction of the subject matter. The revised statutes (1 R. S. 353, § 30 *et seq.*) provide that when two or more persons shall have lands adjoining, each of them shall make and maintain a just proportion of the division fence between them, except the owner or owners of either of the adjoining lands shall choose to let such land lie open. In the latter case, if he shall afterwards enclose it, he shall refund to the owner of the adjoining land, a

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just proportion of the value at that time, of any division fence that shall have been made by such adjoining owner, or he shall build his proportion of such division fence. The 32d section provides that the value of the fence, *and the proportion thereof to be paid by such person*, and the proportion of the division fence to be built by him, in case of his enclosing his land, shall be determined by any two of the fence-viewers of the town. The 34th section provides that each party shall choose one fence-viewer, and if either neglect, after eight days' notice, to make such choice, the other party may select both. The fence-viewers are required to examine the premises and hear the allegations of the parties. Their decision must be reduced to writing, must contain a description of the fence, and of the proportion to be maintained by each, and must be forthwith filed in the office of the town clerk of the town. Their decision is made final upon the parties to such dispute and to all holding under them.

The facts proved on the trial brought this case within the foregoing provisions. The fence-viewers had jurisdiction of the subject matter. The defendant had the requisite notice, and is as much concluded by the decision, as if he had attended in person, before the fence-viewers, at the time of their examination of the premises. From the certificate of the fence-viewers it appears that the only dispute submitted to them was the proper proportion of the value of the said division fence to be paid for by the defendant. They passed upon that question only. They gave a description of the fence, the value at the time of building the same and its present value, and then decided that \$38,25 was the just proportion for the defendant to pay. The 36th section requires the decision of the fence-viewers to be reduced to writing, and directs that it shall contain *a description of the fence, and of the proportion to be maintained by each*. This latter clause need not be inserted, when there has been no submission to the fence-viewers of the proportion of fence each was required to maintain.. It is to be presumed there was no dispute on that point, in this case, as that matter was neither submitted or passed upon. The section does not in terms say that the certificate shall state *the proportion of the value of the di-*

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vision fence which the defendant is to pay. But as the certificate is required to be in writing, and as this was the only matter in dispute submitted, it was obviously necessary that the amount should be stated. The 36th section is merely directory as to the contents of the certificate. The appraisement contemplated by the 37th section is for a different cause from that specified in the 31st and 32d sections. We think an action can be sustained on this certificate, for the amount stated therein, after the jurisdictional facts had been established.

The statute makes the party, enclosing land which had formerly lain open, liable to pay to the party who had built the whole division fence a just proportion of the value *at that time*, of such fence—that is, of the value *at the time of the enclosure*. This enclosure took place in May, 1847. The certificate of the fence-viewers is dated in August, 1848, and it finds the proportion of said value to be paid by the defendant to the plaintiff to be \$38,25, “that being, in our judgment *the present value* of said fence, to wit, 75 cents a rod.” It is objected that the fence-viewers have not pursued the language of the statute, but instead of finding the value at the time of the enclosure, they have found the value at the time of the giving the certificate, more than a year subsequently. If this were so, it would be an error in favor of the defendant, rather than against him. But the fair meaning of the certificate, when taken altogether, is that by *present value* was intended the value at the time of the enclosure. The fence-viewers were speaking of that time.

The practice of submitting controversies between the owners of adjoining land, to the decision of *fence-viewers*, originated in the colonial government. The first law on the subject was passed in 1750. (1 *Van Sch. L. of N. Y.* 290, § 3.) It has been retained, with some modifications, in every subsequent revision of the laws. (2 *Greenl.* 172, § 18. 1 *K. & R.* 332, § 14. 2 *R. L. of 1813*, 133, § 17.) But none of the statutes provided for the present case, until the revision in 1830. The 31st section as adopted, was not in the report of the revisers, but was introduced with some other changes, by the legislature. It has not hitherto

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been the subject of any judicial decision, which has been brought to our notice.

There is a strong equity, that he who has let his land lie open, until the adjoining owner has constructed the entire division fence, should be compelled, when he encloses his lot, and receives the benefit of the fence erected by his neighbor, to make satisfaction for the just proportion which he ought to have built. The common law did not provide for this case, and none of the statutes, prior to 1830, contained any adequate provisions on the subject. It was a very suitable matter to submit to the decision of the fence-viewers of the town, and the statute which makes their determination final upon the parties, is dictated by principles of sound and enlightened policy.

There was in truth no evidence of an accord and satisfaction, which would have authorized the jury to find for the defendant. Their verdict was right upon the merits. The county court did not err in affirming the judgment of the justice.

Judgment of county court affirmed.

[ESSEX GENERAL TERM, July 7, 1851. *Willard, Hand and Cady*, Justices.]

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ADAMS vs. THE SARATOGA AND WASHINGTON RAILROAD
COMPANY.

When the owner of real estate in a village lays out a street through the same, and divides the land on each side of it into village lots, which he sells to individuals in fee, commencing his boundary at a stake in the line of the highway, but not including the highway, by express terms, the respective grantees take to the center of the highway.

A dedication of land to a public street, accepted and acted upon by the public since 1806, can not be revoked by the original owner of the road, or by a person claiming under him, so long as it remains in public use as a street.

The grantee of a lot bounded on a street *prima facie*, takes to the center of the street. To prevent the grant having this effect, there must be language expressly excluding the street.

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Ejectment will not lie for a street, unless the occupation thereof by the defendants, is *wholly inconsistent with the public easement*.

The effect of a record of the appraisal of damages under the 9th section of the act of 1834, p. 440, in concluding the former owner from a right to recover the same, considered. (a)

To allow a street in a city to be used for a railroad track, either upon its natural surface, or by tunneling, is not a misapplication of it; provided such use does not interfere with the free and unobstructed use of it by the public, as a highway for passage and repassage.

In the city of New-York, the legal title to the soil of the streets, is vested in the corporation. In other parts of the state the legal presumption is, that the fee is in the owner of the adjoining lots. *Per WILLARD, P. J.*

THIS was an action of ejectment, commenced on the 25th February, 1848, to recover possession of two several parcels of land in the town of Whitehall, in the county of Washington. The declaration contained several counts, and the plea was the general issue; and no question arose upon the pleadings. The cause was tried before Willard, justice, at the December circuit, 1849, in Washington county.

The *first* piece of land sought to be recovered, is that part of Church-street, in the village of Whitehall, which the defendants occupy for the tracks of their railroad, and through a part of which they had constructed a tunnel for their railroad. The case on the part of the plaintiff was this: In 1806, General Williams was the owner, among other things, of a farm in the now village of Whitehall, called the *Caton hill* lot, containing about 106 acres of land, and embracing what is now called Church-street, and the lots on each side of said street. There were then no buildings or street upon the lot, and it was mostly an open common. In the same year General Williams sold the

(a) The court of appeals, at the April term, 1852, reversed the judgment of the supreme court in this case, and ordered a new trial, with costs to abide the event, on the ground that the evidence offered on the part of the defendants to disprove the jurisdictional facts recited in the record of appraisal, should have been received at the circuit. The reversal does not affect the authority of the case on the points above stated. We have inserted the part of the opinion of the supreme court, on the effect of the record as evidence, supposing that it might be useful in the further discussion of the same subject.

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lot to Jeremiah Adams, the father of the plaintiff, and the deed was executed a year or two after, in pursuance of such sale, by Colonel Williams, the son and devisee of General Williams; the latter having in the meantime died. In 1806, immediately after the purchase of the lot, Jeremiah Adams went into possession of it, and laid out a street, which is now called Church-street, and erected a fence on each side of the street. The street was 1044 feet long, and 55 feet wide. He laid out lots on each side of the street, and erected one or two buildings thereon, and sold them to others. All the lots on both sides of the street, were taken up by different persons, prior to the death of Adams. Adams died in 1839, having first duly made his last will and testament, whereby he devised to his wife Patience Adams, all the real estate of which he was seised. Patience Adams, on the 15th March, 1847, executed to the plaintiff a warranty deed of all the lands devised to her by the will of her husband.

Church-street ran nearly north and south. The defendants' railroad passes through the center of that street. The tunnel occupies 608 feet in length, and 18 in width at the base. The stone work extends about three feet further on each side, making the whole width of the tunnel in the center of the street, 22 feet. The defendants began to construct their railroad in April, 1847, and commenced operations at each end of Church-street, in December, 1847. The street was impassable as a highway, by means of the defendants' operations, and so continued till the commencement of the suit. It was necessary to climb ladders to get into the church, situate on the street; and in many places it was impossible to go along the street on foot. These obstructions were made in building the tunnel, and in preparing the ground therefor. There was no evidence that the plaintiff ever owned any lot on either side of Church-street. The street is now in the compact part of the village of Whitehall.

The plaintiff's counsel offered to show, that Jeremiah Adams opened the street originally for his own benefit, and until his death, always claimed to own the street, and that this claim was

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open and notorious. This offer was objected to, and excluded by the court, and the plaintiff's counsel excepted.

The plaintiff's counsel also offered to show that, in all the conveyances of lands along and adjoining Church-street, the descriptions therein were so drawn as to exclude Church-street. This testimony was not objected to. A deed of one of the lots from Spicer to Wright, and of another from Hicks to Jones, were produced, and the boundaries were read in evidence. The starting place of one of the lots, was at a stake standing on the west line of the highway, and being the southeast corner of a lot formerly owned by Chubb, then running south $10^{\circ} 30'$ west, 4 rods, to a stake, then west $60^{\circ} 30'$ north, 15 rods, to a stake; then north $10^{\circ} 30'$ east, 4 rods, to a cedar post, standing on the south line of the Chubb lot; then east $10^{\circ} 30'$ south, on Chubb's south line, 15 rods, to the place of beginning, containing 60 rods of land, more or less. It was then admitted that the several deeds from Jeremiah Adams to the grantors above named, Spicer and Hicks, described the premises conveyed in the same way.

The *second* piece of land claimed, was a part of the home farm of Jeremiah Adams, of which he was in possession at the time of his death, and to which the plaintiffs claimed title by the same documentary evidence under which he claimed title to the soil of Church-street. It was admitted that the defendants' railroad passed through the said farm, and occupied about $\frac{1}{10}$ of an acre, of which they were in possession at the commencement of the suit.

The defendants introduced Martin Lee, Esq. county judge of Washington county, and proved by him that an assessment case was completed before him in 1847, and they produced the record under the 9th section of the defendants' act of incorporation. (*See Laws of 1834, p. 440.*)

The record was set out at large in the bill of exceptions, and is here inserted, viz.

"In the matter of the Saratoga & Washington Railroad Company, and certain owners of lands on the line of their railroad, for appraisement of damages.

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Washington county, ss. Whereas by virtue of the act entitled 'an act to incorporate the Saratoga & Washington Railroad Company,' passed May 2, 1884, the said company were empowered, amongst other things, to purchase, receive, and hold such real estate as might be necessary in accomplishing the objects for which the said incorporation was granted, and by their agents, surveyors and engineers, to enter upon and take possession of, and use all such land and real estate as might be necessary for the construction and maintenance of the single or double railroad, or way, and the accommodation requisite and appertaining thereto, and to receive, hold and take all such voluntary grants and donations of land and real estate, for the purpose of said road, as should be made to the said corporation to aid in the construction, maintenance, and accommodation of the said single and double railroad or way. But, all lands or real estate thus entered upon which were not donations, were required to be purchased by the said corporation of the owner or owners of the same, at a price to be mutually agreed upon between them. And in case of disagreement as to price, and before making any portion of said road on said land, the said corporation, or the owner of said land, might apply by petition to the first judge of the court of common pleas of the county in which said land is situated, who was authorized to proceed to appraise the said lands and damages, in the manner and form directed in and by the act aforesaid. And in case of the inability of said judge to conduct the said proceedings, any other judge of the same court, to whom no reasonable objections were made, was thereby empowered to conduct the same, as by the said act to which reference is hereby made, will more fully appear. And whereas, the lands and real estate, hereinafter described, are necessary for the construction and maintenance of the railroad of said company, and the accommodations requisite and appurtenant thereto. And the said company and John P. Adams, who is the owner of the same, disagree as to the price of the same. And whereas, the said corporation, before making any portion of said road on said land, in and by virtue of the said act, and the several acts amending the same,

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did, on the 21st day of April, 1847, apply by petition in the manner directed by said act of incorporation, to John McLean, Esq., first judge of the court of common pleas in the county of Washington, in which said lands are situated; who thereupon the same day directed the sheriff of the said county to give public notice in at least one newspaper printed in said county, that at some future day, not less than thirty days from the first publication of said notice, the clerk of said county, and the said judge, would proceed to draw at the clerk's office in said county, the names of twelve persons to serve as a jury between the said railroad company and the owners of lands along and adjoining the line of the railroad of said company, as then located in the county of Washington, with whom a disagreement as to the price of such lands then existed, in appraising said lands and the damages the said owners thereof should individually sustain by reason of their appropriation to the use of said company, in the same manner as the names of the persons were then drawn for juries in courts of record. And whereas, the said sheriff, in pursuance of such directions, on the 21st day of April, did give such public notice for more than thirty days, in manner and form as therein directed, in one of the newspapers printed in said county, called the Washington County Post, and therein appointed the 24th day of May, 1847, at ten o'clock, in the forenoon, at the clerk's office of said county, as the time and place of drawing such jury; at which time and place, the said judge and Henry Shepherd, then being the clerk of said county, attended; and in pursuance of such notice, drew the names of twelve persons as such jury, in the same manner as the names of persons were then authorized by law to be drawn for jurors in courts of record, who were duly qualified, and to whom no objections were made, and neither of them resided in any town through which the said railroad passes, or was of kin to any of the said owners claiming damages, or interested in the said railroad, or of kin to those who were interested in said railroad, or said damages. And whereas the said judge, on the 5th day of July, 1847, in pursuance of the act entitled 'an act in relation to the judiciary,' passed May 12th, 1847, did order

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that the said matter, and all proceedings to be had therein, be transferred to Martin Lee, Esq., who was elected to discharge the duties of county judge of said county, on giving one day's notice of said order; which notice was duly given as therein required. And whereas, the said Martin Lee having taken jurisdiction of said matter, did on the 15th day of July, 1847, by his warrant in writing, duly issued for that purpose, direct said sheriff to summon said jury, and appoint the 10th day of August, 1847, at the hotel kept by Mr. Washburn at Fort Edward, in said county, at 11 o'clock in the forenoon, as the time and place for said twelve persons to be summoned by the said sheriff, to appear as such jury; at which time and place, the undersigned judge appeared, and Daniel T. Payn, Esq. sheriff of the said county, and the said jury who had been duly summoned by the said sheriff also appeared, and in the presence of the parties the said judge duly drew by lot from the said names of the said twelve persons six, who were qualified, and were free from all exceptions, and who were then and there duly sworn well and truly to appraise the lands of certain owners situate along and adjoining the line of the railroad of said company, as then located in the county of Washington, with whom a disagreement as to the price of such lands then existed, and the damages the said owners should sustain by reason of the appropriation of said lands to the use of said company, and a true verdict therein give according to evidence; the names of such jurors so sworn as aforesaid, are hereinafter mentioned. And thereupon the said matter and proceedings were duly adjourned until the 22d day of September then next, at 2 o'clock P. M. at Bordwell's tavern, near Comstock's landing, in the town of Fort Ann, in said county; at which last mentioned time and place, the undersigned judge appeared, and the said jurors and parties also appeared, and such proceedings were thereupon had that the said matter and proceedings were further adjourned until the 16th day of November then next, at 9 o'clock in the forenoon, at the Phoenix hotel in the town of Whitehall, in the said county; at which last mentioned time and place, the undersigned judge appeared. and the said jurors and parties also

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appeared ; and the said jurors were then and there duly sworn well and truly to appraise the lands of the said John P. Adams, situate along and adjoining the line of the railroad of said company, as then located in the town of Whitehall in said county, and the damages the said John P. Adams should sustain by reason of the appropriation of the said lands to the use of the said company, and a true verdict therein give according to evidence. And the said jurors having heard the proofs and allegations of the parties, which were delivered in open court, and in the presence of said parties, a majority of said jurors so sworn as aforesaid, did then and there on the 17th day of November, 1847, duly make up and deliver to the said judge their verdict and award in writing, appraising the said lands and damages aforesaid of the said John P. Adams, at the sum of \$350,00 ; which verdict is in the words and figures following, viz. 'In the matter of the Saratoga and Washington Railroad Company and John P. Adams. We whose names are hereunto subscribed, and seals affixed, being a jury duly elected, tried and sworn before the Hon. Martin Lee, judge of the county courts in and for the county of Washington, in pursuance of the act entitled 'an act to incorporate the Saratoga and Washington Railroad Company,' to appraise the lands of the said John P. Adams, situate along and adjoining the line of the railroad of said company, as at present located in the town of Whitehall, in said county, and the damages the said John P. Adams shall sustain by reason of the appropriation of said lands to the use of said company, having heard the proofs and allegations of the parties, do, upon our oaths. appraise the same at \$350,00 ; which said lands are described as follows, viz. All that certain piece of land situate on the farm now occupied by the said Adams, in the town of Whitehall, in said county, and being that part included within the two outward lines of the railroad of the Saratoga and Washington Railroad Company, as surveyed by James B. Sargent, engineer, in 1847, being a strip two rods in width on each side of the central line of said road, and containing ninety-nine one hundredths of an acre of land. Witness our hands and seals this 17th day of November, 1847. Le Roy

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Morey, [L. s.] C. V. K. Woodworth, [L. s.] Archibald Moore, [L. s.] Ansell Roberson, [L. s.] John J. Launouth, [L. s.] Pardon Bassett. [L. s.]' And the same was duly certified by the said judge, and filed in the office of the clerk of the said county. And whereas, due proof has been given to the said judge within thirty days after such assessment, that the amount of the same has been deposited to the credit of the said John P. Adams, by said company, in the Bank of Whitehall, being the place directed by said judge for such deposit; and that all expenses have been fully paid, and at least fourteen days' notice of the time and place of such assessment, was duly given to said John P. Adams; and all the requirements of the said acts having been fully complied with on the part of said company. Now, therefore, I, the said judge, in compliance with said acts, do order and decree, that the said assessments and proceedings be, and the same are in all respects, hereby ratified and confirmed. To the end that after this decree is recorded in the clerk's office of the said county, the said corporation shall be possessed of the premises and real estate above described in the verdict of said jury, and may enter upon and take possession and use the same for the purposes of said railroad, agreeably to the provisions of the several acts aforesaid. In witness whereof, I have hereunto put my hand and seal this 11th day of December, A. D. 1847. Martin Lee, county judge of Washington county.' I certify the preceding to be a true record of the original decree, and of the judge's certificate, indorsed thereon. Recorded December 11, 1847, at 9 A. M. H. Shipherd, clerk."

The plaintiff's counsel objected to the admission of this record in evidence, as being incompetent and immaterial; and insisted that the defendants must first prove by evidence *aliunde*, that the county judge had jurisdiction, and that the preliminary proceedings were taken. He also insisted that the decree was void on its face; that the money required to be deposited was not proved to have been deposited, and it was not shown that when the proceedings were commenced, there was any location of the defendants' road on the plaintiff's land. The court over-

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ruled the objection, and received the evidence, and the plaintiff's counsel excepted.

The defendants' counsel then offered in evidence a certificate of deposit of \$350 to the credit of J. P. Adams, signed by the cashier of the bank. This was objected to by the plaintiff's counsel as hearsay, but received by the court, and the plaintiff's counsel again excepted.

The defendants rested, and the plaintiff offered to show that the record was false in every particular; that the recitals therein were false; that at the time notice for drawing the jury was said to have been published the defendants' road was not located on the lands described in the decree. The defendants' counsel objected to this evidence, on the ground that the record was conclusive evidence of the facts stated therein, and the court sustained the objection; to which the plaintiff's counsel excepted.

A variety of other offers were made and excluded, which are noticed in the opinion of the court.

The court nonsuited the plaintiff, and his counsel excepted.

J. Gibson, for the appellant. I. The plaintiff was improperly nonsuited as to so much of the lands in question as was occupied by the defendants in Church-street, because (1.) Ejectment will lie for lands crossed by a public highway. (*Per Savage, C. J. in Saunders v. Wilson*, 15 Wend. 338, citing *Goodtitle v. Alker*, 1 Burr. 133, 145. See also *Lade v. Shepherd*, Str. 1004; 10 Petersd. Abr. 225, and cases there cited; *Gidney v. Earl*, 12 Wend. 98; 8 Am. Com. Law, 399, and cases cited; *Dovaston v. Payne*, 2 Smith's Lead. Cas. Am. ed. 183, et seq.; 1 Saund. Pl. and Ev. 447; 2 Id. 396; *Babcock v. Lamb*, 1 Cowen, 238; Bac. Abr. Bouv. ed. tit. Highways, 668, and cases cited; *Pearsall v. Post*, 20 Wend. 126, per Cowen, J.; *Adams on Eject.* 18, 19; *Benedict v. Goit*, 3 Barb. S. C. R. 468; *Cortelyou v. Van Brundt*, 2 John. 357, 363; *Jackson v. Hathaway*, 15 Id. 447; *Perley v. Chandler*, 6 Mass. Rep. 454, 457; *Adams v. Emerson*, 6 Pick. 57, 59; *Commonwealth v. Peters*, 2 Mass. Rep. 127; *Stackpoole v. Healy*, 16 Id. 34; *Chambers v. Furry*, 1 Yeates, 167; *Makepeace v. Worden*, 1 N. Hamp.

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Rep. 16; *Mayor, &c. v. Swan*, 2 *Wm. Bl.* 11, 16; *Cowen's Tr.* 2d ed. 818, note 1; *Runnington on Eject.* 130; 3 *Kent's Com.* 432, 433, note c, and cases cited, 5th ed.; *Reed v. Leeds*, 19 *Conn. Rep.* 182.) It is said that lands over which there is a public highway can not be recovered in ejectment, as the sheriff can not deliver possession. This objection is sufficiently answered by Lord Mansfield in *Goodtitle v. Alker*, (*supra*,) viz. "That the sheriff delivers the possession subject to the easement." It might as well be said that ejectment would not lie for lands subject to an annual rent, as the sheriff can not there give an absolute possession—or for a pew in a church, as the owner is only entitled to the *usufruct*, not the unqualified possession; and yet in both cases ejectment will lie. (*Ithaca Church v. Bigelow*, 16 *Wend.* 32. *Baptist Church v. Witherevell*, 3 *Paige*, 302. *Shaw v. Beveridge*, 3 *Hill*, 26.) Again; the statute regulating the action of ejectment provides for the case in question. By 2 R. S. 303, §§ 1, 2, 3, this remedy is allowed where the plaintiff "has a subsisting interest in the premises claimed." By § 30, sub. 6, (*Id.* 307,) it is provided that the verdict shall state such interest as the party is entitled to recover. By § 32, (*Id.* 308,) the judgment shall be that the plaintiff recover possession "according to the verdict." Thus no public right can be affected by the judgment. The verdict might have described the plaintiff's estate as in fee subject to the public highway; if the plaintiff attempted to continue the nuisance erected by the defendants, he could be indicted, or the public could abate it by their own act. It is a uniform rule of the common law, that wherever a right of entry exists and the interest is tangible, ejectment will lie. It has been often held to lie for any thing attached to the freehold whereof the sheriff could deliver possession. If it will lie for things attached to the soil, *a fortiori*, as to the soil itself. The action has been held to lie for a right of common, (*Baker v. Roe*, *Cas. Temp. Hard.* 127; *Newman v. Holdmefast*, *Stra.* 54;) so for a coal mine, (*Comyn v. Kyneto*, *Cro. Jac.* 150; *Comyn v. Wheatley*, *Noy*, 121;) for a fishery, (*King v. Old Arlesford*, 1 *T. R.* 358;) for the right to herbage or grass, (*Wheeler v. Toulson*, *Hard.* 330;) and

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even for the pasture of 100 sheep, (*Anon.* 2 *Dall.* 95. *Adams on Eject.* 19.) In all these cases the interest was merely an *usufruct*, but in the case at bar the right claimed is the soil and all trees above and all earth or minerals below its surface. In the cases cited, the ejectment is subject to the dominant right. So in that under hearing it is subject to the public right of way. The one is not at all inconsistent with the other. But the reason for this objection is false in point of fact; the sheriff can deliver the possession without interfering with or interrupting the public right of passage. Take for instance the tunnel excavated by the defendants thirty feet below the surface of Church-street, and 600 feet long and 16 feet wide. What obstacle is there to its delivery by the sheriff to the plaintiff on a writ of possession? None whatever. The action of ejectment as it exists and is given and regulated by statute in this state, will lie for lands covered by a highway. It is given in all cases heretofore accustomed, and also in all the cases in which a writ of right might be brought, and by a widow for her dower. (2 *R. S.* 303.) In order to sustain a statute ejectment, the plaintiff is only required to have "a *valid subsisting interest* in the premises claimed and a right to *recover the same*, OR to recover the *possession* thereof, or of some *share*, INTEREST OR *portion* thereof to be proved and established at the trial." (2 *R. S.* 303, § 4.) It will thus be seen that the remedy by ejectment under this statute is far more broad and comprehensive than at common law; and the plaintiff claims that such extension of the remedy entitles him to sustain this action, because, the case is one which had it existed previous to the revised statutes would have entitled the plaintiff to maintain a writ of right. But if a writ of right would not lie, the plaintiff is still entitled to sustain this action, as the statute permits an ejectment to be brought whenever a party "is entitled to *recover*, OR to *recover possession*." The statute thus allows the action, without regard to the question of possession; or to the question of whether his title is a *whole* or a *fraction*, or merely a "share, interest or portion." If the party claiming is entitled to recover *any interest whatever*, he can maintain the action—and even a *scintilla* of right is suf-

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ficient for that purpose. Had the plaintiff, then, an interest in the land, within this statute? He owned the fee and right of soil in the premises in question; subject, it is true, to a public right of way, which reduced the value of his interest; still, it was an interest in land, and was of some value. If so, he ought to have the statute remedy for its recovery. (2.) But the lands in question had ceased to be a public highway, and *pro tanto* the plaintiff was entitled to recover. The defendants had enclosed the lands sought to be recovered, with stone walls three feet thick and with a permanent iron railing; they claim the entire possession; and exclude all persons from the same for any purpose; and their cars stand thereon and block the way and prevent individuals from the ordinary use and benefit of such lands as a highway. For the defendants under these circumstances to pretend that the lands they occupy are the public highway, is absurd. It is presumed these acts are with the assent of the public, as no dissent has been shown, and the highway ceased to be an open street more than three years since. No attempt to reclaim the public right has been made. It is fair therefore to imply public assent. And so far as the defendants are thus in the exclusive possession of any part of the street, it is, for so much, a discontinuance; and wherever a highway is discontinued in whole or in part, the land reverts *pro tanto*, in full and unqualified dominion to the original owner. (*In the matter of John and Cherry-streets*, 19 Wend. 675. *Hooker v. Utica Co.* 12 Id. 371, 373. *Jackson v. Hathaway*, 15 John. 447. 2 *Kent's Com.* 5th ed. 307, note a. 3 Id. 432, 3, note b, and cases there cited.) The denial of the right of the plaintiff to recover so much of the street as has ceased to be a public highway, is a denial of his right to recover the whole in case the defendants had taken the whole; for so much as they have taken, they claim to hold exclusively, and the public right of passage in that is absolutely gone. (*See Harrison v. Parker*, 6 East, 154, 160.) The dedication was a right of passage; the owner never parted with the fee; the defendants entered and severed the passage, so that the right dedicated could not be used; and the power to use having ceased, the thing dedicated

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reverted to the owner discharged of the right of use by the public. The defendants were mere *wrongdoers* in entering on the right of soil of the plaintiff in this suit, though expressly authorized so to do by law. (*The Seneca Railroad Co. v. The Auburn Railroad Co.* 5 *Hill*, 170, 181. *Per Nelson, Ch. J. in Fletcher v. The Auburn Co.* 25 *Wend.* 462, 464.) By the common law the fee in the soil over which a road passes remains in the original owner. If the road is vacated by the public, he resumes the exclusive possession. While it is used as a highway, the timber and grass upon its surface and the minerals below it are his; and he may maintain trespass against any one obstructing the way, or ejectment for its exclusive appropriation. (See the several cases cited point 1, sub. 4, and also 3 *Kent's Com.* 5th ed. 432; 5 *Mason*, 195; *Fairfield v. Williams*, 4 *Mass. Rep.* 427; *Tippets v. Walker*, *Id.* 595; *Bolling v. Mayor, &c.* 3 *Rand.* 563; *Harris v. Elliot*, 9 *Peters*, 25; *per Nelson, C. J. in Cornell v. The Butternuts Co.* 25 *Wend.* 365, 368; *Com'rs of Canal Fund v. Kempshall, per Verplanck, senator*, 26 *Wend.* 414; *Woolryche*, 5.) And where the highway is founded on a *dedication*, the *use* of the land only is dedicated; the title to the soil remains in the landowner. (*Pulley v. Municipality*, 18 *Louis. Rep.* 278. See also *Id.* 122, 286. *Mayor, &c. v. Ward*, 2 *Stra.* 1238, 9.) The deed from Spicer to Wright, and so of the several deeds of other lands on Church-street, convey by a description which excludes the street, thus: "Beginning at a stake standing in the west line of the highway," (Church-street,) "thence running south 18 deg. 30 m. west," &c. which is the course of that street; so that this description excludes any part of the street by metes and bounds. It is impossible therefore so to construe the deed as to convey any portion of the street: "for," as was said by Kent, J. in *Jackson v. Striker*, (1 *John. Cas.* 286,) "the lands therein described and conveyed are accurately ascertained by metes and bounds and the premises are not included; and being a corporeal as contradistinguished from an incorporeal hereditament, the road could not pass by any of the general and usual words thrown in at the end of the metes and bounds." (See also on this subject note b

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to *Jackson v. Striker*, in 2d ed. of *John. Cases* ; also *Jackson v. Hathaway*, *supra* ; *Cowen & Hill's Notes*, p. 373, and n. 315 ; *per Bradish, president*, in *Child v. Starr*, 4 *Hill*, 369, 382 ; *per Bronson, J. in Starr v. Child*, 20 *Wend.* 161, and cases there cited ; *per Oakley, Ch. J. in Hammon v. McLachlan*, 1 *Sandf. S. C. Rep.* 323, 341.) (3.) The defense of dedication, by the plaintiff's father, of lands in Church-street, wholly fails, so far as concerns the four rods at the extreme south end ; for the lot of which that formed a part was not owned by him until nearly twenty years after he had opened Church-street. There was no pretense to found any dedication of the four rods, and the plaintiff, as to so much, was improperly nonsuited. (4.) It will not be presumed that the occupants of the lots adjacent to Church-street own to the center of the highway ; because such a presumption is never indulged in favor of a mere *occupant*. It is only in favor of an *owner* ; and Adams being shown to be the owner, the occupant is deemed to hold in subordination to his title. Such a presumption will never be indulged in the presence of positive proof as to who is the owner. (*Per Bradish, president*, in *Child v. Starr*, 4 *Hill*, 369, 382 ; *S. P. per Bronson, J. in Starr v. Child*, 20 *Wend.* 149, 166.) (5.) If, however, the presumption is indulged, still it is not conclusive ; it is clearly open to explanation and contradiction. (*Child v. Starr*, 4 *Hill*, 369, 382. See also the several cases cited by *Bronson, J. in 20 Wend.* 162.) In the case at bar, the presumption was rebutted by the evidence received or by that offered and rejected. Adams' claim of title precludes the idea that he had ever parted with the fee. (6.) No such presumption can be indulged as to the unoccupied lots. It must be presumed, as to them, that the plaintiff is the owner. (*The People v. Dennison*, 17 *Wend.* 312. *Wendell v. The People*, 8 *Id.* 183.) Thus, even on the ground assumed by the defendants' counsel, the nonsuit was improperly granted, because as to those lots, the plaintiff being the owner was presumed to own to the center of the street ; and as to so much of the premises in question as lay adjacent thereto, he was entitled to a verdict.

II. The court erred in not submitting so much of the case as

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relates to the lands covered by Church-street, to the jury, and in not receiving the evidence offered by the plaintiff on that subject, because—(1.) The question of dedication to public use, of the lands in Church-street, by the plaintiff's father, and the extent and operation of that dedication was entirely for the jury. It is claimed by the defendants that the dedication extended to the fee; while the plaintiff insists that it was merely a right of way. The court excluded some of the evidence offered by the plaintiff to show the extent of the dedication, and nonsuited the plaintiff, and refused to submit the question to the jury—thus, in effect, holding that it was a dedication of the fee. The question of dedication, like that of adverse possession, should always be submitted to the jury: it is compounded of law and of fact; and the court should never undertake to pronounce upon it as a matter of law. (2.) The court erred in presuming as matter of law that the occupants of lots on Church-street, owned to the center of the street. The court should have submitted the question to the jury. (3.) The court should also have submitted to the jury, whether so much of Church-street as was in the exclusive possession of the defendants, had not ceased to be a public highway. (4.) And for these purposes the court improperly excluded the evidence offered by the plaintiff, showing the nature and extent of the dedication, as inferrible from the act of the person dedicating: as that he ever till his death continued to claim the fee of the street; that this claim was "open, public, and notorious;" that no deed was produced conveying any portion of the street; while, on the contrary, it was shown affirmatively that he had bounded his grantees not *on the street*, but on a line which by metes and bounds excluded the street. But instead of excluding the evidence, it should have been received and submitted to the jury with proper directions. (*Per Stebbins, senator, in Schaubert v. Jackson*, 2 Wend. 9, 59. *Briggs v. Prosser*, 14 Id. 227, 9. *Per Sutherland, J. in Jackson v. Sackett*, 7 Id. 94, 100. *Per Savage, Ch. J. in Jackson v. Warford*, 7 Id. 62, 67. *Hunter v. The Trustees of Sandy Hill*, 6 Hill, 407, 410. *Parker v. Foote*, 19 Wend. 309, 315. 3 Stark. Ev. 1243. 1

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Id. 77. 1 *Greenl. Ev.* 4th ed. 58, § 48. *Rowan's Ex'rs v. Town of Portland*, 8 B. Monroe, 250.)

III. The plaintiff was entitled to recover the premises covered by the track of the defendants' road over his home farm, because, (1.) The record of the proceedings on the assessment could not legally be received in evidence without proof *aliunde* of the preliminary proceedings necessary to confer jurisdiction. The uniform rule is that jurisdiction must be shown where the tribunal is not one of general jurisdiction. It is never presumed in favor of an inferior court or officer executing a special authority. And the recital of the facts necessary to confer it, in the order of the court or officer, is not sufficient evidence *per se*, but there must be proof of those facts *aliunde*. In England this rule is well settled. (*Per Manning, J. in Rex v. All Saints*, 1 Man. & Ry. 663, 666, and *per Bayley, J. in the same case. Rex v. Gilkes*, 2 Id. 454. *Stanley v. Fielden*, 5 B. & A. 425.) It is claimed that such is not the law in this state. In *Barber v. Winslow*, (12 Wend. 102,) such recitals were held to be *prima facie* evidence, and *Jencks v. Stebbins*, (11 John. 224,) is cited to sustain this view. But both those cases were under a statute which made the document conclusive evidence. *Per Bronson, J. in Bouchard v. Dias*, (3 Denio, 238, 242,) saying, "that recitals never prove jurisdictional facts; if so, inferior courts might acquire jurisdiction by merely affirming the existence of the facts on which it depends." In that case an application was necessary to be made, and as there was no proof of an application, the court held there was no jurisdiction. So in the case at bar, an application by petition was necessary, and as there was no proof of its having been made, there was no jurisdiction. In *Sharpe v. Johnson*, (4 Hill, 92, 96,) the same rule was enforced. The recital of a fact to prove the execution of a power of any description, is not even *prima facie* evidence of its existence. (*Cowen & Hill's Notes to Phil. Ev.* 1081, 1289, 1290, 1430, and cases there cited. *Sharpe v. Spier*, 4 Hill, 86. *Striker v. Kelly*, 7 Id. 24, and cases there cited. *Varick v. Tallman*, 2 Barb. S. C. Rep. 113. *Kennedy v. Newman*, 1 Sandf. Sup. C. Rep. 187.) See also *Bennett v. Burch*, (2 Denio, 141, 147,) where

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Beardale, J. says, "That jurisdictional facts must be proved in the ordinary way; and in no case can it be done by a mere recital, unless the legislature by law declare that such effect shall be given to a recital. The legislature may do it, but the common law knows nothing of that mode of proof." But if wrong in these views, still it is clear that where the record *omits* the allegation of any jurisdictional fact, it is not admissible for any purpose, without substantive proof of such fact. (*Gallatian v. Cunningham*, 8 Cowen, 361, 369, 370. *Benn v. Borst*, 5 Wend. 292.) In the case at bar the record omits the allegation of the following material facts: that the defendants' road was ever located from one *terminus* to the other. This was an essential averment, for no jury could be drawn till the entire road was located. This appears by the defendants' charter, § 9, which enacts that no person shall be drawn as a juror who resided in any town through which the road passed; and unless there was a location the officer drawing the jury could not *know* from what towns to strike off jurors. Nor is it recited that when the petition was presented to the judge, or when the notice of drawing the jury was published, the road had been *located* over the lands of the plaintiff. There is therefore no notice to the plaintiff of the drawing of the jury, and he was therefore never legally made a party to the proceedings. It was by this location and notice, if at all, that jurisdiction was obtained; and it should affirmatively appear that the statute was complied with. (*Corwin v. Merritt*, 3 Barb. S. C. Rep. 341, 344. *In the matter of Underwood*, 3 Cowen, 59.) It is not recited that there was *at the time of the application* to the judge any *disagreement as to the price* of the lands in question, between the plaintiff and the defendants; nor that the plaintiff's lands were *at that time* necessary. The only allegation is at fol. 40, where the recital is in the present tense and the date of it is Dec. 11, 1847—when the jury was drawn months before. The very next allegation is in the past tense, and recites that the defendants "*did*" make application on a certain day, &c. Nor does the record recite that notice of the application by the defendants to the first judge, for the order transferring the proceedings to the county judge, was ever given

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to the plaintiff. It is true the record recites that he was notified of the order after it was made. The statute (*Sess. L.* 1847, 343, § 76) only authorized the order to be made on notice; and without such notice the order made was a mere nullity; and the county judge had no jurisdiction. (*Case v. Thompson*, 6 *Wend.* 634. *Cowen & Hill*, 297, 998.) And it is not recited in the order that the defendants ever paid, deposited, or tendered the damages to the plaintiff. They could not enter on the plaintiff's lands till this was done; (*Charter*, § 9;) and if the statute does not bear that construction it would be void. (*Bloodgood v. Mohawk Co.* 18 *Wend.* 9.) The record contains no recital of that fact; all that it states is that: "Whereas due proof has been given" of such deposit, &c. This is no allegation of the deposit as a fact. It authorized the judge to make the record, but did not confer authority on the defendants to enter on the lands. (2.) The plaintiff should have been allowed to prove that its recitals were false. The foundation which supported the record would thereby be removed. The recitals being false, the proceedings were by an officer not having jurisdiction, and were therefore void. Jurisdiction is ably and briefly defined by Baldwin, J. in *The United States v. Arredondo*, (6 *Peters*, 709,) thus: "The power to hear and determine a cause is jurisdiction; it is *coram judice* whenever a case is presented which brings this power into action; if the petitioner states such a case in his petition, that on demurrer the court would render judgment in his favor, it is an undoubted case of jurisdiction." The plaintiff's offer, here, stripped the record of every pretense on which to found jurisdiction, as there was no "power to hear or determine." In *Harrington v. The People*, (6 *Barb.* 607,) Mr. Justice Paige says: "The jurisdiction of a court, whether of general or limited jurisdiction, *may* be inquired into, although the record of the judgment states facts giving it jurisdiction." (*See also Bowman v. Russ*, 6 *Cowen*, 234; *Dunning v. Corwin*, 11 *Wend.* 267; *Watson v. Spence*, 20 *Id.* 265; *Gallatian v. Cunningham*, 8 *Cowen*, 361, 370; *Striker v. Kelly*, 7 *Hill*, 9; *Seymour v. Judd*, 2 *Const.* 464.) The cases proceed upon the broad principle, that nothing is to be intended in favor of the authority of infe-

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rior courts, or officers executing summary powers, or a special authority, but that the party seeking to avail himself of their proceedings, must show affirmatively that there was full and complete jurisdiction. (*Cornell v. Barnes*, 7 Hill, 38, in note.) Such proceedings are liable to be attacked collaterally or otherwise, whenever set up, to found a right or sustain a defense. In the case under hearing, however, they are not attacked collaterally; but as was said by Savage, Ch. J. in *Adkins v. Brewer*, (3 Cowen, 206, 208 :) "The defendants are called on *directly*, not *collaterally*, to show why they have undertaken to dispose of the plaintiff's property. They must then show a lawful authority." That was an action of trespass for taking property on a justice's process—this is an ejectment to recover lands taken under a judge's process. It is a *direct* call for the authority of the defendants, and not *collateral*. The doctrine of *res judicata* has no application to the case under argument, to prevent the plaintiff from showing the falsity of this record. This subject is ably discussed by Mullett, J. in *Broadhead v. McConnell*, (3 Barb. Sup. C. Rep. 175, 189.) In that case, as in this, the party appeared and objected, and the officer overruled the objection, and it was sought to sustain the proceedings as *res judicata*, but the court held otherwise. In *Striker v. Kelly* the same fact appeared, (see 7 Hill, 11,) and no force was allowed to the fact. See to the same point, per Johnson, J. in *Prosser v. Secor*, (5 Barb. S. C. Rep. 607, 612;) per Spencer, Ch. J. in *Bigelow v. Stearns*, (19 John. 39, 41,) overruling, so far as it holds the doctrine claimed by the defendants, the case of *Mather v. Hood*; also 2 Phil. Ev. 251; *Cable v. Cooper*, (15 John. 152, 157;) *Spalding v. The People*, (7 Hill, 301, 304;) *Walker v. Moseley*, (5 Denio, 102;) *Cow. & Hill's Notes*, 800, 801; *Barber v. Winslow*, (12 Wend. 104;) *People v. Corties*, (1 Sandf. S. C. Rep. 228, 247;) *Elliot v. Piersol*, (1 Peters, 328, 9;) *Ex parte Clapper*, (3 Hill, 450;) *Pearsall v. Com'rs, &c.* (17 Wend. 17.) The attempt of the defendants to engraft the doctrine of *res judicata* on proceedings of corporations in taking private property, has not even the merit of novelty. It has been repeatedly made, and as often denied; and the reason is ably and

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briefly given by Bronson, J. in *Sharp v. Speir*, (4 Hill, 76, 87 :) "There is little, if any thing of a judicial nature in the proceedings of corporations to take lands, either by way of assessments or for public use. It is the mere execution of a power." This doctrine should not apply, as the judge before whom these proceedings were pending, had no power to decide on the question whether the preliminary proceedings were valid, or whether the defendants had located their road before proceeding to take the lands. His power under the charter was merely ministerial. (*The President, &c. v. Patchen*, 8 Wend. 47.) From the nature and course of the proceedings on these assessments, it will be seen that the party could not avail himself of the same means of defense and redress, as are open to him in the present suit, and therefore the doctrine claimed ought not to apply. (1 Greenl. Ev. 630, § 524, 4th ed.) The plaintiff's appearance was no waiver. Consent can never confer jurisdiction; and where there is no jurisdiction of the subject matter, no assent or submission of the parties will confer it. (*Per Walworth, chancellor, in Dakin v. Deming*, 6 Paige, 989.) In *Striker v. Kelly*, (sup.) the party had appeared and contested, and yet held no waiver. And so per Bronson, J. in *Matter of Faulkner*, (6 Hill, 598.) For further authorities that the record may be contradicted, see *Schneider v. McFarland*, (4 Barb. S. C. Rep. 144;) *Wheeler v. Townsend*, (3 Wend. 248;) *Ford v. Walsworth*, (15 Id. 449;) *Harrod v. Barretto*, (2 Hall's N. Y. Rep. 302;) *Case v. Thompson*, (6 Wend. 634;) *Coven & Hill's Notes*, 909, and cases cited; *Smith v. Rice*, (11 Mass. Rep. 313.) The decree was made up on false allegations, for the purpose of giving the judge jurisdiction and enabling the defendants to obtain possession of the plaintiff's lands without title and without his consent. False suggestions in obtaining it will vitiate the decree or judgment of any court. (*Dutchess of Kingston's case*, Amb. Doug. 421. *Borden v. Fitch*, 15 John. 145. *Per Weston, J. in Harding v. Allen*, 9 Greenl. R. 140, 150. 1 Phil. Ev. 261. *Jackson v. Jackson*, 1 John. 424. *Morris Canal Co. v. Nathan*, 2 Hall's N. Y. Rep. 239. *Doe v. Martin*, 4 T. R. 39. *Fermor's case*, 3 Co. 77. *Thoroughgood's case*, 2 Id. 9. *Hart v.*

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Ten Eyck, 2 *John. Ch.* 62.) There is a distinction between *Mather v. Hood*, with its kindred cases, and the case at bar, existing in the fact that the record was there interposed as a *shield* to protect judicial or ministerial officers from prosecution—but here it is sought to be used as a *sword*, to divest the owner of his estate without his consent. Several familiar instances of this distinction will be found in *Cornell v. Barnes*, (7 *Hill*, 36, and note.) (3.) But the court should at all events have allowed the plaintiff to prove that certain facts, not alledged in the record, and necessary to jurisdiction, had not occurred. (4.) The record was absolutely void on its face, because it did not show affirmatively that the power conferred by the statute to take the plaintiff's lands was *strictly pursued*. These proceedings are special and summary, and no appeal is given by the statute; they are under a statutory power in favor of a corporation and in derogation of common right; and such statutes are construed strictly, never equitably. (*Sprague v. Bidwell*, 2 *Cowen*, 419. *Sharpe v. Speir*, *supra*. *Van Winkle v. Railroad Company*, 2 *Green's N. J. Rep.* 162. *Rex v. Cook*, *Cowp.* 26. *Westervelt v. N. Y.* 2 *Hoff. Ch. Rep.*) And they are under a power whereby the title of the plaintiff is claimed to have been divested and transferred to the defendants, without his consent; and in such cases every requisite having the semblance of benefit to the owner must be strictly pursued, or the proceeding will be utterly void. (*Per Cowen, J. in Atkins v. Kinnan*, 20 *Wend.* 249. *Sharp v. Speir*, and *Sharp v. Johnson*, *supra*. *Flowed. Com.* 206. *Striker v. Kelly*, and *Varick v. Tallman*, *supra*. *Cowen & Hill's Notes*, 1289, *et seq.* 6 *Paige*, 554, note a. *Doughty v. Hope*, 8 *Denio*, 598; *S. C. in error*, 1 *Comst.* 79.) And the record of proceedings in such cases must show affirmatively that the statute has been fully complied with. (*Starr v. Trustees of Rochester*, 6 *Wend.* 563, 566. *Gilbert v. Columbiaville Turnp. Co.* 3 *John. Cas.* 107.) And when the record is deficient in an integral point, it may be treated as a nullity. (*Cowen & Hill's Notes*, 1012. Also *Ross v. McClung*, *per Marshall, Ch. J.* 6 *Peters*, 288.) Indeed all summary proceedings under special statutes must strictly follow the statute, and

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it must appear affirmatively that they are regular. (*Rex v. Hullcott*, 6 T. R. 583. *Davison v. Gill*, 1 East, 64. *Grumon v. Raymond*, 1 Conn. Rep. 46. *Rex v. Halfshire*, 5 T. R. 341, 345. *Rex v. Arnold*, 3 Burr. 312. 1 Saund. R. 26, note. *Rex v. Yorke*, 5 Burr. 26, 84. *Powers v. The People*, 4 John. 292. *Rex v. Chilverscoton*, 8 T. R. 178. *Rex v. Judd*, 2 Id. 255. *Rex v. Brown*, 8 Id. 26. *Austin v. Donner*, 6 Id. 436. *Thatcher v. Powell*, 6 Wheat. 119, 127. *Per Whyte, J. in Earthman v. Jones*, 2 Yerg. 493. *Bradleston v. Sprague*, 6 John. 101, 103. 1 Kent's Com. 3d ed. 466, note d.) Thus where a statute required an offender to be brought before the next justice, it must appear by the commitment that this was done, or it will be void. (1 Saund. 263, n. 6, and the cases there cited.) So in *Hunt v. Hapgood*, (4 Mass. R. 117, 121,) Parsons, Ch. J. holds a judgment of a probate court void, because the record did not on its face show jurisdiction. (See also *Cowen & Hill's Notes*, 1013.) And wherever the proceedings are void whether on their face, or for want of jurisdiction, or for any other reason, they may be attacked directly or collaterally. (*Walker v. Moseley*, and *Spaulding v. The People*, supra.) "Lawless power is never so dangerous as when executed by public officers according to the forms of law. The remedy for such abuses ought to be direct and ample." (*Per Platt, J. in Suydam v. Keys*, 13 John. 446.) The law therefore allows a party at any time and whenever a question arises, to show that legal proceedings were without jurisdiction. As instances of this, see *Wise v. Withers*, (3 Cranch, 331;) *Crepps v. Durden*, (Cowp. 640;) *Sherman v. Ballou*, (8 Cowen, 304, 307;) *Welch v. Nash*, (8 East, 394.) The defendants' charter required that the judge should make a record of the proceedings containing "all the facts." The statute has thus prescribed the form of the decree, and if that form is not pursued, it is a nullity. (*Fitch v. Commissioners, &c.* 22 Wend. 132, 135. *Davison v. Gill*, 1 East, 64. *Goss v. Jackson*, 3 Esp. 198. *Cole's case*, Sir Wm. Jones, 170.) There is no room for any presumption to be indulged in favor of this decree, that any thing was done which is not specified; for the statute required that every thing which was done should

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be stated, and it would be a neglect of duty in the officer to omit the statement of any portion of the proceedings. The record omits to state the contents of the petition made by the defendants to the judge. It should have been set out, that it might be seen whether it was as alledged; "in the manner required by said act." The presenting of the petition is alledged equivocally. It is that the defendants applied "by petition." In *Rex v. Oakley*, (4 *Barn. & Ad.* 307,) Denman, Ch. J. said: "it is not sufficient for justices to state that they found the detainer *unlawful*. They ought to have stated the facts which made it so." So the word *duly* rendered the act void in *Fitch v. Commissioners, &c.* (*supra.*) It should have been stated that it was in writing—its contents set out, and should have made out a case conferring jurisdiction on the judge, to issue the warrant. (*President, &c. v. Patchen*, 8 *Wend.* 47, 60. *Per Paige, senator, in Stone v. The Mayor, &c.* 25 *Id.* 172. *Gilbert v. Columbia Turnpike Co.* 3 *John. Cas.* 2d ed. 107, 541. *People v. Judges, &c.* 20 *Wend.* 186, 7.) The notice given by the sheriff was a nullity. It appears to have been directed to the "owners of land along and adjoining the line of the railroad as then located," &c. The plaintiff should have been named as owner; and it should appear that the road was then located on his lands. (*Per Bronson, J. in Sharp v. Speir*, 4 *Hill*, 90, 91.) The notice should have been set out, and the record is void for not setting it forth. (*Per Aston, J. in Rex v. Croke, Cowp.* 26, 30.) Nor does the record show a legal publication of the notice. That the whole proceedings were void for this reason, see *Muzzy v. Whitney*, (10 *John. Rep.* 226.) It is said the proceedings were transferred to the county judge by the first judge. But the order of transfer was void, as it was not made on notice, as required by the statute. No notice whatever is stated in the record to have been given to plaintiff of the time and place when the jury were to be impaneled, or when the damages would be assessed. (*Rex v. Croke, Cowp.* 26, 30. 3 *John. Cas.* 2d ed. 108, and note *a*, and 541. *Bernard v. Brewer*, 2 *Wash. C. C. R.* 76. 22 *Wend.* 135. 20 *Id.* 186. 4 *Hill*, 601. *Cowen*

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& *Hill's Notes*, 1024. *Rex v. Gaskin*, 8 T. R. 209.) (4.) The proceedings to obtain the plaintiff's lands were unconstitutional and of no force or validity. The provision in the charter authorizing the damages to be assessed *by a jury* was *ipso facto* repealed by the new constitution which ordained that: "When private property shall be taken for any public use the compensation to be made therefor, when not made by the state, shall be ascertained *by a jury*, or by not less than *three commissioners*, appointed by a court of record *as shall be prescribed by law*." (*New Constitution*, art. 1, § 7.) This article went into operation on the first day of January, 1847, and the whole proceedings were subsequent to that time. Section nine of the defendants' charter, was expressly repealed by that clause of the constitution relative to existing laws, which ordains, that: "such of the said acts, *or parts thereof*, as are repugnant to this constitution, are hereby abrogated." (*Art. 1, § 17*.) The constitution required damages to be assessed in one of two ways, and the legislature were directed to choose which. The charter had previously enacted that damages should be assessed in *only one way*. The constitution and the charter were thus *inconsistent*, because the former opened the subject and authorized the legislature to select one of the two ways; such selection was "to be prescribed by law," and because the latter provided for only one thing, while the former provided for one of two things—there was evidently *two ways* by the former and only *one* by the latter. These provisions should be construed as if they stood in context, being in *pari materia*. (*Pennington v. Coxe*, 2 Cranch, 38. *Strode v. The Stafford Justices*, 1 Brocken. R. 162.) It would then read: "Private property shall not be taken for any public use without just compensation, to be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law." Thus the prohibition is *absolute*, except upon compliance with a certain condition, the performance of which requires the action of the legislature. It may be *difficult*, even *impossible* to comply with this condition—but such difficulty or impossibility does not in the least avoid the constitutional prohibition. (*Per*

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Bronson J. Sharp v. Johnson, 4 Hill, 92, 99.) No necessity can be begotten which is to override the constitution and reduce its wise provisions against despotism to a nullity. Where a constitutional provision is positive, no legislative "sanction or formality" is requisite to enforce the enactment; such a provision carries its own sanction with it and is operative *per se*; as instances of this *vide art. 1, §§ 14, 15*. If formalities, or sanctions, or legislative acts are necessary as to the *mode* of compensation, *a fortiori* as to the *right* of taking private property at all. If any clause in that instrument needs a "sanction or formality," more than another, it is that which allows private property to be taken without the consent of the owner. The point we intend to raise is, that if legislation is necessary to enable the plaintiff to obtain compensation for his lands, then the defendants can not sustain their defense, for they had no right or authority to enter on his lands until they had made him compensation therefor. (*Bloodgood v. The M. and H. Railroad Company*, 18 Wend. 9. *Per Edwards, senator, at page 27, and per Maison senator, at p. 33.*) If the defendants could not enter on the plaintiff's lands till they had made him compensation, and legislation was necessary to enable them to make such compensation, and they actually entered without making it, then they have taken the lands of the plaintiff "without due process of law, and without compensation,"—and instead of violating only one provision of the constitution, they have violated two. In doing this they were clearly trespassers. The constitution grants the power to the legislature to prescribe by law the manner in which damages on taking lands for public purposes shall be appraised, whether by jury or by commissioners. This was a virtual repeal of all previous laws authorizing the assessment of damages in *any* manner. For the specification of *the manner* in which a thing shall be done, or of the *tribunal* by which it is to be done, virtually excludes all other ways of doing the act, and all other tribunals by which it could be done. (*The People v. Foote*, 19 John. R. 58.) The rule of construction in such cases is *expressum facit cessare tacitum*. (*Cates v. Knights*, 3 Term

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R. 442; *Smith's Com.* 654.) In the case at bar the constitution has specified two tribunals, one of which may be designated to assess damages, and directed the legislature to select which should perform the duty—one of them must be chosen—and a previous law which had appointed another tribunal for the same purpose is necessarily repealed. "When a statute limits a thing to be done in a particular form, it includes in itself a negative that it shall not be done otherwise." (*Plowd.* 206, b.) So affirmatives in statutes that introduce a new rule imply a negative of all that is not within the purview. (*Hob. Rep.* 298, *S. P. Cohen v. Hoff*, 2 *Tred. R.* 661.) (5.) The record of the proceedings whereby the plaintiff's land were taken, should not have been received in evidence without proof of the damages having been paid to the plaintiff. It was no proof of title, till the damages were paid; and the objection was distinctly taken. The damages not having been paid or deposited, the defendants were mere trespassers. (*Thompson v. Grand Gulf Co.* 3 *How. R.* 240. *The People v. Hillsdale Co.* 2 *John. R.* 190. *Messerole v. Brooklyn*, 8 *Paige* 198. *Smith's Com. on Stat.* 486, and cases there cited.) And where the validity of a deed or of any other transfer of property, depends on an act *in pais*, the party claiming under it is as much bound to prove that, as he would a matter of record. (*Jackson v. Esty*, 7 *Wend.* 149. *Jackson v. Shepard*, 7 *Cowen*, 88, 90. *Butler v. Palmer*, 1 *Hill*, 324. *Cowen & Hill's Notes*, 1289, and cases there cited.)

IV. Improper evidence was received and proper evidence rejected on the trial of the issues relative to plaintiff's farm, for which a new trial should be granted. (1.) The petition, offered in evidence by the plaintiff should have been received. Certainly the defendants ought to have known whether they owned the plaintiff's farm, and here under oath they say they did not. It was a declaration of one in possession, in disparagement of his own title and therefore admissible. (1 *Greenl. Ev.* 4th ed. 134, § 109. *Id.* 631, § 527. *Id.* 121, § 97. *Jackson, v. Bard*, 4 *John.* 230. *Jackson v. Dennison*, 4 *Wend.* 558.) (2.) The certificate of deposit of the plaintiff's damages was also improperly received. It was mere hearsay—entirely unofficial—and should

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have been rejected. *Cowen & Hill's Notes*, 1047, 8. 1 *Stark. Ev.* 46. 1 *Greenl. Ev.* 4th ed. 162, 3, § 124.) For these reasons the nonsuit should be set aside and a new trial granted.

Wm. L. F. Warren, for the respondents. I. The offer to prove that Jeremiah Adams originally opened Church-street merely as a road for his own benefit, and that he always claimed to own the road and the fee thereof, and that such claim was open, public and notorious, was properly overruled. This street was laid out in 1806, and fenced, and was always afterwards used as a public street. After forty-four years of public use, the offer to show that it was opened as a private street was no answer to the presumption arising from public use. That he *claimed the fee* of the street required no proof. It was matter of law, and it was not pretended that the owner had by opening it as a street parted with the right to the soil. It was proved "that Church-street was laid out in 1806 by Jeremiah Adams and fenced immediately, and lots leased and sold, and buildings erected, and that it was mostly built up on both sides, and had been occupied ever since as a public street." The same facts were proved by a number of the plaintiff's witnesses and were undisputed. By opening the street and selling lots thereon, Jeremiah Adams was estopped from reclaiming the street. It was a public dedication, and ceased to be a private street, and his claiming the fee, or the private use, was immaterial and could not alter the legal effect of his dedication. The grantees who occupied and built on the side of the street were *prima facie* owners to the center. Nor were the mere declarations of Jeremiah Adams evidence, under any circumstances. Declarations of title are never admitted, except in favor of or against a party in possession, to define and characterize such possession. The offer here was simply to show a claim of title by a party out of possession. Besides, this was a question to be determined by *acts*, not *declarations*. It was one of dedication, which is established and controlled by actual use. The use can not be limited or extended in its effect by simple declarations. The opinion of the court, that ejectment would not lie to recover any part of Church-street

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was correct. This opinion is sustained fully by the case in 6 *Peters' Rep.* 432. But the plaintiff insists that the statute regulating ejectment provides for the case in question. (2 *R. S.* 303 §§ 1, 2, 3.) By statute the action is retained "in the cases and the manner heretofore accustomed," and no recovery can be had unless the plaintiff has a "valid subsisting interest," and right to recover. This does not extend the action to any new cases. The first section makes the action subject to the provisions thereafter contained, one of which is a writ of possession. (Sec. 35.) This writ requires the sheriff to give possession: an actual *pedis possessio*. How can he do this, when the public have the right of possession? So far from making this a new case, the statute and its provisions exclude it, by making it subject to a provision which is impossible to perform. No actual possession of a highway by an individual can consist with the actual possession of the public. (1 *Ch. Pl.* 188. 6 *Peters*, 432.) It is not a case in which a writ of right would lie. The plaintiff has no subsisting interest in the highway, of which he can avail himself. He has parted with it to the public. It is only contingent. The verdict of the jury (by § 31,) regards only the possession, not the mere right of property. By § 34, the judgment is that the plaintiff recover possession according to the verdict, and by § 35, the sheriff delivers possession. How could the sheriff deliver possession of the premises according to the writ, except by the manual or physical delivery; and how could this be consistent with the public right of way? But the plaintiff insists that he can recover judgment without recovering possession. The law is not so inconsistent. Of what use is a judgment without the power of enforcing it? The statute is imperative, requiring the jury to give a verdict, on which a judgment is rendered and a writ of possession awarded. The action in the 1st § of the statute, is given subject to all these contingencies. If, however, the plaintiff's counsel is right in his construction of the statute, his conclusion is not helped. The defendants assert no title to the fee, nor is there any evidence of occupation inconsistent with the plaintiff's claim. The officers of the public, in the use of the streets as a public highway, could

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have done all that the defendants have assumed to do. The use and improvement of a portion of the easement, have been, for the better accommodation of the public, exercised by the defendants, as the agents and officers of the public. That the streets have been excavated and partially enclosed with proper guards, is no infringement of the plaintiff's reversion. The use of a street for a railroad, either upon its natural surface, or by tunnelling, is not a misappropriation of it, provided such use does not interfere with the free and unobstructed use of it by the public as a highway for passage and re-passage. (*Plant v. The Long Island Railroad Co.* 3 *Amer. Law Jour.* 364. 9 *Leg. Obs.* 53; 10 *Barb.* 26, *S. C. Drake v. Hudson River Railroad Co.*; 7 *Barb.* 508.) But it is said the lands had ceased to be a highway, and had reverted to the owner. If this be true, any trespass or misapplication of a highway, by a disseisor, would work a forfeiture of land and use to the original owner. The public have not abandoned the use, nor can there be any discontinuance of a public highway, except by the action of the commissioners under the statute, or an adverse use for twenty years; an encumbrance upon the easement, by the defendants or others, would not work a discontinuance. The case in 6 *East*, 154, was an action of trespass, for personal property severed by defendant from a bridge which had been built by the plaintiff, and dedicated to public use. And the court held that as the plaintiff had built the bridge of his own materials, these continued his property when unlawfully taken away by a wrongdoer, and a recovery was allowed. But the counsel says although the plaintiff was properly nonsuited as to that part of Church-street which was on the "Katonhill lot," it was not proper as to the one acre south of it, because he says Jeremiah Adams did not own this lot until twenty years after, and could not have dedicated it to the public. Church-street was laid out *as it now is*, and continued on a straight line through both of these lots, and had been used as a highway near half a century, and the same rule of law which would prevent a recovery in ejectment, for one part, would apply to the whole.

II. The plaintiff contends it was a question of dedication

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which ought to have been left to the jury. This is not the correct view. The action was ejectment to recover "Church-street," which was proved to be a public highway for forty-four years. This fact there was no dispute about, on either side. In the course of the proof it appeared it was originally dedicated for a street, and the plaintiff then insists it is a question of dedication. In this he is mistaken; for although it might have never been dedicated by Jeremiah Adams, yet the fact that it has existed as a public highway for forty-four years is surely enough to make it such, without any dedication at all. But the answer to a claim for a recovery of the one acre south of Katon hill lot is plain. (1.) All the proof on the subject of the one acre is our admission, that after the commencement of this suit we occupied a ticket office on the line of Church-street south of the Katon hill lot. This is not an admission that we occupied any part of the one acre lot, or that the ticket office was on the one acre lot, or that we occupied it when the suit was commenced. (2.) The plaintiff's dedication covers only the land occupied by Church-street, and does not embrace the ticket office. (3.) Our admission is that we occupied after suit brought, and not previously, nor at the time the suit was commenced. (4.) The deed of the one acre is uncertain in description. It says on the west side of main highway (not Church-street,) and could not include the ticket office, which was on the east side. It is true Mr. Lamb, a witness, says that it lies both sides of the street; but this contradicts the deed, which locates it all on the west side of the road.

III. There was no proof that the plaintiff owned the fee of Church-street, and he could not recover on that ground. The proof is that the street, which was opened in 1806, was built up on both sides and the lots leased or sold, and the grantees in possession are to be deemed owners. (20 *Wend.* 96. 12 *Id.* 99.) The deed of the one acre gives the plaintiff no right to the street extending south of Katon hill lot. The deed locates the one acre west of the street. Besides, the deed of Spicer & Hicks runs south 10°, 30' west, whereas Church-street runs due north and south, proving that the premises in

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the deed do not cover the street. As to the two or three vacant lots spoken of by the witness, the proof is the witness don't know to whom they belong, don't know as the plaintiff owns any lots not on Church-street, has vacant lots not on the street. Plaintiff is not in possession of any lot on Church-street. So far as these lots are concerned, we have not interfered with them, or with the street in front of them; we are not in possession, and the ownership of the plaintiff is not clearly proved. Of course it gives him no prima facie right to the soil of the street. But if the plaintiff did own the soil in the street, we proved an occupation of it for a public road, for half a century, which is sufficient to establish an highway, without resorting to proof of dedication, and consequently there was no question of dedication to be submitted to the jury. The only question was, was Church-street a highway *in fact*. Under the proof it was so assumed, and the court decided that no recovery in ejectment could be sustained for a public highway.

IV. After the court had disposed of the case, so far as related to Church-street, the defendants resisted the recovery as to the residue of the land claimed in the declaration, being $\frac{1}{16}$ of an acre, situated on what was called the home farm of the plaintiff. The defendants claimed that this portion of the land had been taken by them for the purposes of their railroad, and had been duly appraised under the statute; laws of 1834, p. 440, § 9. And the defendants introduced the decree of appraisement, to which the plaintiff objected, in various particulars. In answer to which the defendants say—

V. The recitals in the decree are conclusive evidence of the facts recited, except jurisdictional facts. (8 *Cowen*, 187. 8 *John*. 50. 3 *Wend*. 42.)

VI. The recitals in the decree, are prima facie evidence of jurisdictional facts, and when jurisdiction is shown the decree is conclusive. (*Cowen & Hill's Notes*, 1016. 12 *Wend*. 102. 11 *John*. 224. 3 *Wend*. 42. See corporate act, *Laws of 1834*, p. 440, § 9, concluding part of section.)

VII. The judge who made the decree was required by the 9th section of the law of 1834, before cited, to make an order

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or decree particularly describing the land, and reciting the appraisalment, and the mode of making it, *and all other facts necessary* to a compliance with this section. The judge was required to recite the facts contained in the decree, whether jurisdictional or otherwise, and in order to do so he was under the necessity of inquiring into and ascertaining those facts. It was a part of his judicial function, and having adjudicated those facts, they are conclusive. This was no doubt the intention of the legislature in making this requirement. It was designed that the facts should be presented and embodied in a tangible form, and recorded for future reference; and the judge having thus adjudicated those facts, they are in their nature judicial, and can not be impeached collaterally. And hence the rule, when an inferior court is required to ascertain and settle by its decision a certain fact, such decision will conclude. He is bound to inquire as to the fact, and when he has inquired his record is conclusive. (*Vide Cowen & Hill's Notes*, 1016, 1017, 1020, *and cases there cited*; 12 *Wheat.* 19; 7 *Cowen*, 585, 606, 7, 8; 3 *Hill*, 460; 19 *Wend.* 65, *and cases there cited.*) And when the court is authorized to *record* the proceeding, as he was required to do in this case, and the record expressly shows jurisdiction, this is conclusive. In such case the power can not be questioned collaterally. (*Cowen & Hill's Notes*, 1019, 1020, 1021. 8 *John. Rep.* 46, 7. 12 *Pick.* 572, 582, 3.) By the same section of the statute it was the duty of the clerk of the county to record the same, thereby preserving it in the most solemn form, making it equivalent to a judgment deliberately adjudicated, and giving it the high character of a record.

VIII. But it is said by the counsel that the record omits material facts. He says: (1.) It is not recited that the defendants' road was ever located from one terminus to another. (2.) That it is not recited that when the petition was presented or the notice of drawing the jury given, the road had been located over the plaintiff's land. (3.) It is not recited that there was at the time of the application any disagreement as to price, nor that the plaintiff's lands were necessary. (4.) Nor that notice was given of the transfer of proceedings from Judge McLean

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to Judge Lee. (5.) Nor that the defendants paid or deposited the damages awarded to the plaintiff. Now, as to the first and second objections, there is nothing in the statute of 1834 requiring a survey or location to be made or filed, although it was done, and the decree refers to it, as an existing fact, "*as then located in the county of Washington,*" and again where it is recited that neither of the jurors resided in the town through which the railroad passed. Again it refers to owners along the line of road as then located. Again it refers to land of plaintiff along the line of road as then located in the town of Whitehall, and in describing the land of the plaintiff as located along the line of road in the town of Whitehall, and in the description of the land appraised the fact is again referred to. As to the third objection, it is recited in the decree "that the plaintiff and defendants disagree as to price," and also "that the lands are necessary." As to the fourth objection, it is recited in decree that notice of the transfer of proceedings was given. None of these objections are well founded in *fact*. But if they were, they are not jurisdictional, and the party appeared at the appraisal, on due notice, and should have then objected to the irregularity. Consent can not give jurisdiction, but cures every irregularity, as to want of notice or otherwise, not objected to at the time, and gives jurisdiction as to the person. (10 *Wend.* 174. 3 *John. Cas.* 108. 3 *Wend.* 45. 7 *Barb.* 506.) Besides, the record shows that the plaintiff not only appeared but *contested*. The proofs and allegations of the *parties* were given. Although there had been irregularities in the preliminary proceedings, and although the plaintiff might have appeared and objected, his subsequent *contest on the merits* was a waiver of the objections. Besides, these objections were not made at the circuit in the form now stated. Nor was it necessary to show actual disagreement as to price. This was waived by appearance on the appraisal, without objection. (7 *Barb.* 498, 505.) As to the fifth objection, all the statute required was that proof of depositing the damages to the credit of the plaintiff in bank, should be made to the judge in thirty days, which was done. The judge adjudicated the fact, and recites it

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in the decree. The evidence offered, of the certificate of deposit of the cashier was objected to. But it was only cumulative evidence, and if objectionable, a new trial ought not to be granted on that account.

IX. The offer of the plaintiff to prove that the recitals in the decree were false, &c. was properly excluded. The statute requiring the judge to adjudicate the facts and insert them in the decree, made the decree conclusive, except on certiorari to review it. It could not be impeached collaterally. Besides, the offer embraced a great variety of facts, and being all included in one, if any one was objectionable the whole were. From the authorities above cited, (*Cowen & Hill's Notes*, 1014, &c.) it appears, the plaintiff could not disprove certain facts in the decree, which were not jurisdictional, but his offer embraces good and bad alike, and the court was right in rejecting the offer as a whole. The answer embraced a large number of facts, some of which were immaterial or objectionable, and where such is the case the court may properly exclude the whole. There was no attempt by the counsel of the plaintiff to prove a fact separately and distinctly brought to the mind of the court. But the matter would seem to be designed to embarrass the court and opposing counsel by offering the whole mass of facts constituting the defense in a way by which they could not be separately considered in the progress of the trial.

X. The offer to introduce the petition of the defendants, for the appointment of appraisers was properly rejected. It was offered as a whole, and what part of it the plaintiff wished to use he did not state, nor for what purpose. Moreover, it was a mere paper served on him as attorney in another proceeding, and was not authenticated in any way. No proof was offered that the defendants authorized the petition. It was not signed by them, nor was evidence proposed to show the employment of the attorney who served it. It was a matter wholly collateral and immaterial. The attorney was a mere agent, and his declarations could not be received to charge the principals.

XI. The proceedings on the part of the defendants to appraise the lands in question, were not unconstitutional. It is insisted

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that § 9, of Laws of 1834, p. 440, is repealed by the constitution, art. 1, sec. 7, which declares "When private property shall be taken for any public use, the compensation to be made therefor, when not made by the state, shall be ascertained by a jury or by not less than three commissioners appointed by a court of record, *as shall be prescribed by law*," and by § 17, "Such acts as are repugnant to the constitution, are hereby abrogated." The constitution went into effect on first January, 1847. The legislature did not prescribe by law the mode of assessing damages in such cases, until 27th March, 1848. (*See Laws 1848, ch. 140, § 20.*) The proceedings of the defendants to appraise the lands in question, commenced, as appears in the decree, on the 21st April, 1847. The appraisement was on 17th November, 1847, and the decree made in December, 1847.

It is submitted, that until the legislature has prescribed the new mode of assessing damages and thus carrying out the new provisions in the constitution, the old mode of assessment remained, and the defendants having commenced and completed their proceedings under the old statute, and consistently therewith, the objection now made can not prevail. This is the doctrine contained in 3 *Barb. S. C. Rep.* 332, and seems to be the reasonable doctrine. It is also confirmed in 15 *Peters*, 449. Section nine of the defendants' charter was not repugnant to the new constitution, until the legislature had acted, and altered the mode of assessment by a jury. It can not be deemed inconsistent with the constitutional provision, while it prescribes any of the modes directed by the constitution. It was in direct conformity with that instrument, and therefore was a subsisting law, until repealed by legislative enactments. Besides, it is submitted that this objection, not having been discussed or raised at the trial, nor appearing in the case, can not now be raised for the purpose of a new trial.

By the Court, WILLARD, P. J. The facts disclosed by the evidence, present a plain case of dedication for the purpose of a public street. The adjoining lots were laid out and sold with reference to that object; and they have been improved by the

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present owners, by the erection thereon of permanent and elegant buildings. It is now one of the most important streets in the village of Whitehall. A dedication thus made and acquiesced in, can not be revoked. And it is not competent for the party making it, to reassert any right over the land; at all events, so long as it remains in public use. (*In the matter of the Mayor of New-York, &c.* 2 *Wend.* 472. 1 *Id.* 262. 8 *Id.* 85. 11 *Id.* 486. 6 *Peters, S. C. U. S.* 431, 498. 10 *Id.* 662. 4 *Paige*, 510. *Hunter v. The Trustees of Sandy Hill*, 6 *Hill*, 407. 2 *Greenleaf's Ev.* § 662.)

The taking possession of the street by the defendants, for the purpose of constructing a tunnel for their railroad, occasioned a temporary obstruction of the use of it by the public, but afforded no ground for the plaintiff to bring this action, even if the ultimate fee of the land was in him. By the terms of their charter, the defendants had a right to construct their road across or upon a street; but they were required to restore the street to its former state, or in a sufficient manner not to have impaired its usefulness. (*Laws of 1834, p. 442, § 13.*) They had a reasonable time within which to build their road and repair the street. To allow a street in a city or village to be used for a railroad track, either upon its natural surface, or by tunneling, is not a misappropriation of it, provided such use does not interfere with the free and unobstructed use of it by the public, as a highway for passage and repassage. (*Plant v. The Long Island Railroad Co.* 10 *Barb.* 26. *S. C. 9 N. Y. Legal Observer*, 53. *Hudson and Delaware Canal Co. v. The Erie Railroad Co.* 9 *Paige*, 323. *Hamilton v. New-York and Harlem Railroad Co.* *Id.* 171.) The same doctrine is asserted in *Drake v. Hudson River Railroad Co.* (7 *Barb.* 508.) It was not shown that the street will be destroyed or materially injured by the railroad and tunnel, after they shall have been completed. It is a matter of notoriety that railroads pass through all our greatest cities, and many of our villages, without essential injury to the right of passage by teams or persons. Individuals residing in the street must sustain a temporary inconvenience during the continuance of the work, but

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for this, in the absence of negligence and unskillfulness, the defendants are not responsible. It is a case of *damnum absque injuria*. Much less, therefore, can the original proprietor, who does not reside in the street, resume the grant and revoke the dedication, for this cause.

An action of ejectment is a possessory action, and can be maintained only by the party who has a subsisting interest in the premises claimed, and a right to recover the same, or to recover the possession thereof, or of some share, interest or portion thereof. (2 R. S. 303, § 3.) The plaintiff has no such right, until he first shows, that the whole purpose has ceased for which the dedication was made, and the ultimate fee remains in him. This the plaintiff failed to show.

These observations are enough to dispose of the plaintiff's right to recover the premises covered by Church-street. But as the plaintiff's counsel has strenuously insisted that the fee of the road is not in the adjoining owners, and that ejectment is the proper remedy, some additional remarks will be made upon these points.

I. The most embarrassing question which arises in the discussion of the law of dedication, is as to the party in whom the fee of the soil is vested, to which the easement of a public way is attached. The technical language of the common law is so firmly rooted, that the idea of an estate in fee simple can not easily be separated from that of an owner. The fee must rest somewhere, or be in abeyance. Whether, when the owner of a tract of land lays it out into village lots intersected by streets, he continues the owner of the fee of the soil of the street, after having sold the adjoining lots in fee; or whether the fee in the street is transferred by a conclusive inference of law to the proprietors of the lots; or whether it is vested in the public, are questions of great practical importance, and on which a diversity of opinion has been entertained. In the city of New-York, the legal title to the soil of the streets is vested in the corporation. (*Drake v. The Hudson River Railroad*, 7 Barb. 508.) In the country, and other cities and towns, the legal presumption is that the fee is in the owner of the adjoining lots. This has

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always been the law as understood and expounded by the courts of this state. (See *per Thompson, J. in Cortelyou v. Van Brundt*, 2 John. 363; *per Savage, Ch. J. 1 Wend.* 270, and 2 *Id.* 473; *per Walworth, Ch. in Livingston v. The Mayor of New-York*, 8 Wend. 106; *Wyman v. The Same*, 11 Wend. 486; *The Trustees of Watertown v. Cowen*, 4 Paige, 510, 513; *Gidney v. Earl*, 12 Wend. 98; *Hammond v. M'Lachlan*, 1 Sandf. S. C. R. 323; 2 *Kent's Com.* 433.) The case of *Jackson v. Huthaway*, (15 John. 447,) is not in conflict with the above cases. In the latter the highway was expressly excluded by the terms of the deed, as appears by the admissions of the eminent counsel by whom the cause was argued. The learned judge who delivered the opinion of the court remarks that *it was conceded on the argument, that the lands described in the deed did not include the space occupied by the road.* After such a concession it would be idle to pretend that the grantee took to the center of the road.

The boundary of land upon a stream above tide water, stands, at common law, upon the same footing as a boundary upon a highway. The supreme court held, in *Luce v. Carley*, (24 Wend. 451, 453,) that when the grant is so framed as to touch the water of the river, and the parties do not expressly except the river, one half of the bed of the stream, if it be above tide water, is included by construction of law. If the parties mean to exclude it, says Cowen, J. they should do so by express exception. No case in this state, holding a contrary doctrine, has been brought to our notice.

The adjudged cases in the neighboring states are, for the most part, in harmony with those of this state. (*Peck v. Smith*, 1 Conn. Rep. 103. *Chatham v. Brainard*, 11 *Id.* 60.) In *Chatham v. Pendleton*, (13 *Id.* 23,) the description in the deed brought the grantee to the highway, and it was held that he took to the center of the highway, although the highway was not mentioned as a boundary. In *Johnson v. Anderson*, (18 Maine Rep. 76,) a boundary on the highway was said to carry the grantee to the center of the road. The supreme court of Massachusetts, in *Lunt v. Holland*, (14 Mass. Rep. 149,)

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held that land bounded by a river extends to the thread of the stream. But with respect to the boundary of a deed upon a road, a different rule seems to have been adopted in that state. (*Sibley v. Holden*, 10 *Pick.* 249. *Tyler v. Hammond*, 11 *Id.* 193. *Van Olinda v. Lathrop*, 21 *Id.* 292.) In the last mentioned case, Morton, J. concedes that there is a great analogy between a boundary upon a river, which he admits goes to the thread of the stream, and upon a highway; and yet he says that the cases in that state did not, in the latter case, carry the boundary to the center of the road. The case of *Sibley v. Holden*, and *Tyler v. Hammond*, (*supra*), are believed to be opposed to the current of authorities in New England, as well as in this state and Pennsylvania. (*Chatham v. Brainard*, 11 *Conn. Rep.* 82. *Bucknam v. Bucknam*, 3 *Fairfield*, 463. *Leavitt v. Towle*, 8 *N. Hamp. Rep.* 96. *Hart v. Chalker*, 5 *Conn.* 311. *Ball v. Ball*, 2 *Am. L. J.* 499. *N. S. Hammon v. McLachlin*, 1 *Sandf. S. C. R.* 341. *Child v. Starr*, 4 *Hill*, 369. 2 *Smith's Lead. Cas.* 173 and notes, and the cases before cited from New-York.)

The same rule prevails in England. (*Dovaston v. Payn*, 2 *H. Bl.* 527.) This case is made the subject of an elaborate note in *Smith's Lead. Cas.* 2d vol. 173, to which the American editors have added a valuable review of the American cases. (*See also Sir John Lade v. Shepherd*, 2 *Str.* 1004.)

It results from the foregoing observations, that after the opening and dedication of Church-street in 1806, the fee to the road remained in the original owner until the adjoining lots were successively sold and conveyed; and then vested in each successive grantee of the lots to the center of the street, so far in length as his lot extended thereon, there being no words in the grants expressly excluding the street. (6 *Peters*, 436, 498.) But whether the dedication operated by vesting the title in the successive grantees of the lots bounded by the street, or by way of estoppel of the grantor, so long as the purpose of the dedication continues, the plaintiff is, in either case, destitute of any right to recover. (*See per Beardsley, J.* in 6 *Hill*, 452.)

II. If the fee of the road be in the plaintiff, and the defend-

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ants, without granting compensation and without license, have laid the track of their railroad, and constructed their tunnel upon it, ejectionment will not lie for the street, unless the occupation thereof by the defendants is *wholly inconsistent with the public easement*. The remedy of the plaintiff for his damages, is trespass. (*The Trustees of the Presbyterian Church v. Auburn and Rochester Railroad Co.* 3 Hill, 567.) The case of *Goodtitle v. Alker*, 1 Burr. 133,) is relied on to show that ejectionment will lie by the owner of the soil, for land which is part of a public highway. That case was of a peculiar character. The person under whom the defendant claimed had encroached upon a public highway, running through the freehold of the ancestor of the lessor, by permanent erections, and it was then agreed by the parties that the party making such encroachment might occupy and enjoy the same at a certain rent, for one hundred years. A short time before the expiration of the term, the defendant erected another enclosure, embracing a few feet more of the soil of the said road, by a permanent erection, and the action was not brought until after the expiration of the said term of one hundred years. Here was an exclusive appropriation of the road by the defendant, which could not be used for passage or transit by any person, and in that respect, as well as in respect of the agreement, entirely differs from the present case. The use to which the railroad is to be applied, when completed, is not incompatible with the enjoyment of it by the public as a street. It can still be used by the inhabitants residing on it, and by all other persons, for all the purposes for which it was originally dedicated. Their enjoyment of light, air, prospect and social intercourse is not essentially impaired by any portion of the railroad, and in no respects by the tunnel. The business to be transacted by the railroad corresponds in its nature with that usually conducted by means of a public street. It is for the passage of persons and property, in a manner not anticipated by the age in which the common law had its birth. It is still a public street, notwithstanding the railroad. The superior facilities for locomotion which are created by the instrumentali-

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ty of steam, afford no countenance to the present claim of the plaintiff.

The case of *Goodtitle v. Alker*, (*supra*,) has been incidentally approved in this state by judges, without examination, but has never been sanctioned in a case where it was the direct question. It has been disapproved, if not overruled, by the supreme court of the United States, in 6 *Peters*, 486, 498; 10 *Id.* 662. The present case differs, too, in its circumstances, so much from it, that the latter can scarcely be treated as an authority to support the present action. That case has been followed in some of the states. (*See 2 Smith's Leading Cases, Am. ed.* 183, 184, *where the cases are collected.*)

III. The plaintiff's claim for that part of Church-street, covered by the land purchased by Jeremiah Adams of John Williams, in January, 1823, rests on no better footing than that for the portion we have been considering. He owns no land adjoining the street. The occupants of the lots, therefore, must be presumed to hold to the center of the street.

IV. The residue of the plaintiff's claim was for the small part taken from the homestead. For this he was entitled to recover, unless the record of appraisal, introduced on the part of the defendants, afforded *prima facie* evidence that all the steps had been taken to vest the title in the defendants, required by the ninth section of their charter. (*Laws of 1834, p. 440.*) The objections to the introduction of the record, have been so fully treated by Judge Cady in his able opinion on this subject, that I will merely add a few words. The plaintiff did not offer to disprove specifically, any one of the jurisdictional facts recited in the record. The record was at least *prima facie* evidence of the jurisdictional facts; and conclusive evidence of every other fact required to be and actually recited in it. (*The People v. Harrington*, 6 *Barb.* 607.) This court decided at the September term, 1850, in the case of *Polly v. The Saratoga & Washington Railroad Company*,^(a) that a decree precisely similar to the present, afforded a complete bar to an action.

(a) 9 *Barb.* 449.

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The question in that case arose on demurrer to a plea, which set up the record as conferring the authority for the defendants to enter on the plaintiff's land. That case is directly in point. The cases which go to prove that a record made in pursuance of a statute, and which is directed to be recorded as a muniment of title, is conclusive evidence of every fact recited in it, after jurisdiction has been shown, and is *prima facie* evidence of the jurisdictional facts, are, among others, the following. (*Gray v. Cookin*, 16 *East*, 13. *Cowen & Hill's Notes*, 1014, 1016, &c. *Burnett v. Burch*, 1 *Denio*, 141. *Jenkins v. Stebbins*, 11 *John*. 224. *Barber v. Winslow*, 12 *Wend.* 102. *Moody v. Thurston*, 1 *Str.* 481. *Steenburgh v. Bigelow*, 3 *Wend.* 42. *Bouchard v. Dias*, 3 *Denio*, 242. *Harrington v. The People*, 6 *Barb.* 610.)

There is some apparent conflict in the decisions, both in this state and in England, but they have probably arisen from not discriminating between the effect of the record, when it comes up collaterally, and when the proceeding is by certiorari to reverse it. In some of the cases a question of pleading has been confounded with a question of evidence; and in others the distinction between its effect when used to protect the officer by whom it is made up, and its effect upon the rights of parties claiming under it, has not been sufficiently noticed. It is conceded in all the New-York cases, that the legislature may give to such recitals the form of conclusive evidence. (*Bennett v. Burch*, 1 *Denio*, 141.) They have done so in relation to insolvent discharges, in express terms. (1 *R. L.* 464, § 8. *Jenkins v. Stebbins*, 11 *John*. 224. *Barber v. Winslow*, 12 *Wend.* 102. *Frary v. Dakin*, 7 *John*. 75. *Service v. Hermance*, 1 *Id.* 91.) Full effect can not be given to the 9th section of the defendants' charter, unless the record required to be made up, is at least *prima facie* evidence of all the facts recited in it. Why was the judge required to recite in the record all the facts necessary to a compliance with the ninth section of the act; and why was it required to be recorded, unless it was evidence of the facts there recited?

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We think the decision at the circuit was correct, and that the motion to set aside the nonsuit, and for a new trial, should be denied.

[ESSEX GENERAL TERM, July 7, 1851. *Willard, Hand and Cady, Justices.*]

11	487
121a	430
11	487
124a	408

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Malta, vs. TALLMADGE.

If a highway is laid out in the mode pointed out by statute, that may be done at once. But if user is relied upon to prove a dedication to the public, the authorities differ as to the time requisite. Yet there is no doubt user is sufficient. *Per HAND, J.*

A dedication to the public must be with intent to dedicate. But when that intention is ascertained, whether by the express declarations and acts of a party, or by user, it is sufficient.

Forty years before suit, the grantor of the defendant, and his neighbor, opened a lane or road upon their boundary lines, to accommodate the adjoining lands, taking ten feet from each side. The road thus opened was used uninterruptedly by the public, thenceforth, until shut up by the defendant, the year before the trial. In 1848 the commissioners of highways ascertained, described and entered such road upon record. In 1826 they surveyed, laid out and recorded, and made to connect with the road or lane in question, the road beyond, on which inhabitants resided who had no other egress. *Held* that there was sufficient evidence of a *dedication* to the public, upon which the public and individuals had relied; and of an adoption of such road by the proper authorities. And the defendant having purchased a farm adjoining the road, many years after the dedication, and having acquiesced in the use of the road by the public for 22 years, and then obstructed the same, by building a fence through the center thereof; *Held further*, that he was liable for such obstruction, in an action at the suit of the commissioners of highways. *CADY, J.* dissented.

THIS suit was originally commenced before a justice of the peace, and dismissed by him on a plea of title, &c. The action was commenced in this court, May 25th, 1849, and tried before Mr. Justice Cady, at the Saratoga circuit in February, 1850, when a verdict was given for the defendant. The complaint alleged that the plaintiffs were commissioners of highways of

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Malta, in the county of Saratoga, and that a road near to, or adjoining the land of the defendant, had been a highway for more than thirty years, and that the defendant obstructed it by building a fence through the center, which was removed by their order, and the defendant again obstructed it by building fences across and fencing up 80 or 100 rods of it. Whereupon this suit was brought to recover the penalties and damages imposed by statute. The answer denied that there was any such public highway; or that it was or had been for more than 20 years last past, or was ever a highway; but on the contrary, alledged that it was a private lane and used for private purposes alone; and that neither the public nor the commissioners had any right or legal claim, or jurisdiction or authority over the same; and denied that the defendant had injured or obstructed any public highway in the town of Malta, as stated in the complaint. One Waterbury testified that he had known the road about thirty-six years; that the part that had been obstructed had been used by the public ever since he knew it. That the north part of the road, being about one mile in length, had not been opened for some 13 or 14 years. There had been some obstruction, as bars or a gate. There was testimony to show that there had been some occasional travel on the whole length of a road or lane, about a mile and a half long, extending north and south between two other roads. About a mile of the northern part of this road had been cultivated many years, perhaps 13 or 14 years, and at most but a small part of that portion had ever been fenced as a road. There was a gate at the south end of this part. But the southern portion, which was the part in question, had been fenced out as a road or lane. A second witness stated that he had known this road or lane thirty-six years, a third between 30 and 40, and a fourth between 40 and 50, and another 40, and all of them testified to its use by the public during the time, except one, who stated that he and seven others, whom he named, had used it. The testimony further tended to show that formerly there was a factory off westerly, from which a lane or road, two rods wide, commenced, and ran easterly about 30 rods to a place where three families resided.

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Thence it continued about 60 rods, $1\frac{1}{2}$ rods wide, where it intersected with the north end of the lane or road particularly in question in this suit. From thence the latter ran south about half a mile to an east and west road, and was about 20 feet wide. There was no house upon the disputed piece, but the families living on the above roads, westerly, had no outlet but this. One Parks owned the land on the west side, and the defendant on the east side of this road. One Olmstead formerly owned the farm now owned by the defendant, and sold it to the defendant in 1826. One Parks, called by the defendant, testified that he remembered when the road was laid out between his father, who owned on the west side, and Olmstead, who owned on the east. That the witness acted for his father in laying out the road. That was 40 years before the trial, and there was at that time only one family in north. That Parks and Olmstead laid open the road so that Olmstead would not go through his father's land, and so that it could be used as a lane to accommodate the fields east and west. That it was a mere verbal agreement between two neighbors. That he had been pathmaster a number of years, and this road was not attached to any beat, to his knowledge. That every body passed through it that had occasion, but he did not know as the public, by their officers, recognized it as a road until 1848. That he had known the public to use it as a highway for about 40 years; that it had never been closed up until the defendant closed it up in the spring of 1849. That the soil was sandy and did not need repairs like hard land. That the fence on the east side of the road was where it had been for 40 years. A brother of this witness, called by the plaintiffs, testified that he understood his father and the other owner gave each ten feet. There was a road through before, further west, but it was opened where it is now when the 20 feet was given. He had used it 40 or 50 years, and it had always been used by the public. That he did not know when it was opened, but thought it had been opened 60 years. That he had worked it for his own accommodation, and there was a bridge on it. That he had used it to draw lumber to Stillwater 50 years before.

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The plaintiffs proved by the records of the town of Malta, that this road was ascertained, described and entered of record in the town clerk's office by the commissioners of highways of Malta, in April, 1848.

The defendant gave in evidence, under objection, the following, which was recorded in the town clerk's office, March 4, 1829. "A survey of a road laid out by the commissioners of highways, on the 9th day of October, 1826, beginning sixty-five links northward of the north limit of Lewis Waterbury's house, and on the line with the west end thereof, and running thence S. 66 deg. E. 13 chains and 46 links to the middle of the lane running N. and S. between Coleman Olmstead's lane and Patrick Parks, land, the point of intersection being N. 63 deg. E. 33 links from the middle of a pitch pine tree in the N. E. corner of Patrick Parks' field. Thence N. 22 deg. 45 E. 3 chains 73 links to a point in the said line of David Bidwell's land, 43 links N. E. of an apple tree in Coleman Olmstead's field and 47 links S. W. of a certain pitch pine stump, the lines above traced being intended for the middle of the road, and the road $37\frac{1}{2}$ links wide.

Signed the day and date

within, in presence of

Sam'l Hunter, Surveyor.

JOSEPH SIMPSON,

ZADOCK DUNNING,

Com'rs of Highways.

The judge charged the jury, among other things, that the highway must have been adopted by the officers of the town, in order to make it a public highway, as contemplated by statute; and the plaintiffs were bound to show that it was so far a public highway, that the public had adopted it, which they had not done. That merely traveling on the road did not give them a right to it at all. Individuals merely traveling a road, or using it as a right of way, did not make it a public highway, within the meaning of 1 R. S. 521, § 100. It was necessary that the officer representing the public should secure it, or do some act to signify their adoption of it, and in this case there was no proof of such acts prior to 1848. That the act of the plaintiffs in 1848 only showed one year's possession, and therefore could have no effect in this cause. The plaintiffs excepted, and the jury found

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for the defendant. A bill of exceptions was sealed and the plaintiffs appealed.

J. B. McKean, for the plaintiffs.

E. F. Bullard, for the defendant.

HAND, J. The revised statutes declare that "all public highways now in use, heretofore laid out and allowed by any law of this state, of which a record shall have been made in the office of the clerk of the county or town, and all roads not recorded, which have been, or shall have been used as public highways for twenty years or more, shall be deemed public highways, but may be altered in conformity to the provisions of this title." (1 R. S. 521, § 100.) The next section requires the commissioners of highways to order the overseers of highways to open all roads to the width of at least two rods, "which they shall judge to have been used as highways for twenty years." (§ 101.) Another section requires the commissioners "to cause such of the roads used as highways as shall have been laid out but not sufficiently described, and such as shall have been used for twenty years, but not recorded, to be ascertained, described and entered of record in the town clerk's office." (1. R. S. 501, § 1, sub. 3.) And by section 102 a penalty of five dollars is imposed upon "whoever shall obstruct any highway," &c. It perhaps is not important to define what was deemed a highway at common law, as the statute declares that all roads used as public highways for twenty years, may be deemed highways. It seems to me this clause of the statute has great influence upon this case, though I do not think it necessary to put the case upon twenty years' user. "Highway" is the genus of all public ways, whether cart, horse or foot ways. (*Queen v. Saintliff*, 6 Mod. 255. *Holt, C. J.* 4 Vin. 502.) And whether a road shall be deemed a highway from mere user, depends upon the nature of the user. It is doubted in some of the books whether a road can be a highway unless it be a thoroughfare. (*Hoodyer v. Hadden*, 5 Taunt. 126. *Hood v. Veal*, 5 B. & Ald. 454. *King v. Marquis of*

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Downshire, 4 Ad & El. 698.) The judges have been divided in opinion, but there is now, perhaps, a leaning to the opinion that it may be. (*British Museum v. Finnis*, 5 C. & P. 460. *Roscoe on Cri Evi.* 564. *Woolr. on Ways*, 8.) "A thoroughfare," Mr. Webster says, "is a passage through; a passage from one street or opening to another;" and a highway has been said to be infinite, having no *termini*; no *terminus a quo*, nor *terminus ad quem*. (*King v. Hammond*, 10 Mod. 383.) But a *cul de sac* may be a good highway, in this state, if laid out by the proper authorities. In our new country are many public roads not connected with any other, at one end. And the same judge who gave the opinion in *King v. Hammond*, decided that if a vill be erected and a way laid out to it, if there be no other way but that to the vill, it is not material *quo animo* it was laid; it shall be deemed a public way. (*Parker C. J. in Queen v. Inh. of Hornsby* 10 Mod. 150.) If a highway is laid out in the mode pointed out by statute, that may be done at once. But if user is relied upon to prove dedication, the authorities differ as to the requisite time; but there is no doubt user is sufficient. In some cases six, and in another seven years, were required. In *Colden v. Thurbur*, twelve years' use was held *prima facie* evidence that the road had been properly laid out. (2 John. 424.) Lord Kenyon, in *Rugby Charity v. Merriweather*, mentioned a case of six years. (11 East, 375, n.) That case has been doubted; and perhaps more now depends upon the intent than upon the time of sufferance. (*Woolr. on Ways*, 12.) A dedication must be with intent to dedicate. (*Ld. Denman in Barraclough v. Johnson*, 8 Ad. & El. 99.) There must be *animus dedicandi*, and when that is ascertained, whether by the express declarations and the acts of a party, or by user, it is sufficient. The books are full of such cases. (*Ladi v. Shepherd*, 2 Stra. 1004. *Post v. Pearsal*, 22 Wend. 425. S. C. 20 Id. 116. 3 Kent, 451. *Jarvis v. Dean*, 3 Bing. 447. *Surrey Canal v. Hall*, 1 M. & Gr. 392. *Parker v. Van Houten*, 7 Wend. 145. *Galatian v. Gardner*, 7 John. 106. *City of Cincinnati v. Lessee of White*, 6 Peters, 435. *N. Orleans v. U. S.* 10 Peters, 662. *State v. Wilkin-*

son, 2 *Vt. R.* 480. 4 *Paige*, 510. *Hunter v. Trustees of Sandy Hill*, 6 *Hill*, 407. 2 *Smith's Lead. Cas.* 180, and *Am. Notes.*)

Again; the commissioners are to ascertain and enlarge those roads which have been used twenty years. (1 *R. S.* 501, § 1; 521, § 101.) Perhaps the roads can not be enlarged, without compensation. But the commissioners can ascertain what are roads in the town, and when that is done, the road so ascertained becomes a public highway so far as such public act can confirm it; in cases where confirmation is necessary. (*Parker v. Van Houten*, 7 *Wend.* 145.) Though I do not see how such confirmation can be necessary in this case. As a general rule the parish is to repair all highways, no matter how they became such. (*King v. Inh. of Leake*, 5 *B. & Ald.* 469. *Woolr. on Ways*, 76. *King v. Inh. of Wornsey, Holt*, 338. 4 *Vin.* 504, 5.) And a bridge used by the public, *prima facie*, is to be repaired by them, it seems, though built by an individual; and to escape that obligation, it lies with the public to show that the duty rests with another. (23 *Wend.* 450.)

These principles, applied to the road in question, require a new trial. Here was a former road opened perhaps sixty years ago; and forty years before suit the grantor of the defendant, and his neighbor, nearly upon the same site, opened a lane or road upon their boundary lines, taking ten feet from each for the distance of half a mile, from whence it continued on another course into a small neighborhood; and which ever since has been used uninterruptedly by the public, until shut up by the defendant the year before the trial. It is true the factory has been abandoned for years, and but few families have resided beyond the part in question. And it has been decided there can not be a dedication to a limited part of the public. (*Pool v. Huskisson*, 11 *M. & W.* 827.) And it is testified that the twenty feet was opened to accommodate the adjoining lands. But the uninterrupted use by the public alone, I think sufficient evidence of dedication.

But again; in 1826, as I understand the testimony, the road commissioners surveyed, laid out and recorded, and made to connect with the road or lane in question, the road beyond, on

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which inhabitants then resided, who had no other egress. And the public were undisturbed in the use for twenty-two years after. Denominating the road in question the "lane" of A. in that survey could make no difference. If it was a public road before, an admission to the contrary, by a public officer, in a document upon another subject, would not affect the rights of the public. But I think it is rather a declaration that the other part was also a public way, for it would be futile to lay out a road sixty or seventy rods in length, having no connection with any other road. And this takes away the objection that the particular piece in question was a *cul de sac*, if that would make any difference. Possibly from the last course of the survey made in 1826, some other outlet was intended; but if so, it seems no such route has been completed. Nor, under the circumstances, could that alter the case. But there is another circumstance that should not be overlooked. In 1848, the proper officers ascertained, described and entered this road upon record. If any adoption was necessary this was sufficient, and made the public liable to repair. Upon the whole, here was sufficient evidence of a dedication, upon which the public and individuals had relied; in addition to which, the proper authorities had taken legal steps to declare it a public highway. The defendant purchased the adjoining farm many years after the dedication and subsequently acquiesced in the use by the public 22 years longer, and then obstructed the road and shut in his neighbors.

I think the case is clearly against him; at all events the question of dedication should have been passed upon by the jury.

Judgment reversed, with costs to abide the event.

WILLARD, P. J. concurred.

CADY, J. (dissenting.) There can be no dispute as to the origin of the road or lane in question. About 40 years before the trial of this cause, Jehiel Parks and a Mr. Olmstead each owned a farm, bounded by each other, by a line running north and south; and they agreed that they would each give a piece of land ten feet wide for the purpose of making a road or lane twenty feet wide

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between their farms. This would enable each of them to pass conveniently into their respective fields, and a fence was built on each side of the lane so agreed on. This was a lane in the proper meaning of that word—it was “a narrow way or passage as distinguished from a public road or highway.”

In its origin this was a private road or lane; it was the private property of two individuals, to the rights of one of whom the defendant has succeeded. Although the owners of this lane suffered any person who pleased to pass and repass over it on foot, on horseback or in carriages, it did not thereby become a public highway; nor did the owners of it lose the right to control it.

The owners of the land over which this lane passed agreed that it should be twenty feet wide, and it was so fenced and used for about thirty-eight years, before the overseers or the commissioners of highways, who alone had a right to act on behalf of the town, set up any claim to it. It was not at any time during that period included in any road district, or worked as a public highway; and what right had the commissioners of highways of the town of Malta in the year 1848 to come to the owners of this lane, and say to them, gentlemen, in 1810 you or those under whom you claim established this lane twenty feet wide; you have suffered every person who pleased to pass over it for the last 38 years; now we claim it as a public highway, and order it to be made two rods wide, and each of you to move your fence back upon your land six feet? Because you 38 years ago agreed to give and did give ten feet from each of your farms, to make a lane between them, we have a right to take the lane, and six feet more from each of your farms, and convert the whole into a public highway. If the commissioners of highways can do this, what becomes of that clause of the constitution of 1846 which is as follows, “nor shall private property be taken for public use without just compensation”? It can not be denied that the piece of land six feet wide on each side of this lane was in March, 1848, private property: it had been enclosed more than forty years, and it could not in April in that year be taken for public use without just compensation; and unless it could be taken without compensation the commissioners of highways could not

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convert it, or the lane, into a highway; for all public highways must be at least two rods wide.

By 1 R. S. 2d ed. 59, § 1, it is made the duty of commissioners of highways to cause such roads as have been used as public highways for twenty years but not recorded, to be ascertained, described and entered of record in the town clerk's office; and by section 105, page 517, it is made their duty to order the overseers of highways to open all roads to the width of two rods at least, which they shall judge to have been used as public highways for twenty years.

When the commissioners adjudge that a road has been used as a public highway, and ascertain, describe and enter it of record, they are not bound to give any notice thereof to the owners of the adjoining land; and the right of appeal is not given to any person who may deem himself aggrieved by the act of the commissioners in adjudging that a road has been used twenty years as a public highway, and ascertaining, describing and causing it to be recorded. The right of appeal is only given when a person "considers himself aggrieved by any determination of the commissioners of highways, either in laying out, altering or discontinuing, or refusing to lay out, alter or discontinue any road." In this case there was a lane or private road twenty feet wide, and a fence on each side of it; and the commissioners of highways assume the right to adjudge that it had been used as a public highway for twenty years, and ascertain, describe and have it recorded as a public highway two rods wide. Unless this can be deemed a laying out or altering a highway, no right of appeal is given; and if it be a laying out or altering a highway, then the commissioners had no jurisdiction to interfere with the fences and the land on each side of the lane, without the consent of the owner, unless certified to be necessary by the oath of twelve respectable freeholders. The defendant in this case has no remedy, unless he had liberty upon the trial of this cause to deny that the road in question was a public highway. That, therefore, became a material question in the cause.

And what evidence was there that it had for more than twenty years before the year 1848 been used as a public highway? It

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was proved that every person who pleased traveled over it; and that was all the evidence to show that it was a public highway. Was that enough? Suppose there be two public highways, parallel with each other and a mile apart. A man owns a farm between these two public highways and one-fourth of a mile from either of them, and it is necessary for him to have a road through his own farm to each of those public highways, but he is compelled to obtain such private roads by a regular course of law; and he then fences the road on both sides; and on each side of his own fence he is obliged to build and keep up an expensive bridge; and after the road is made passable and the two bridges erected, he leaves it open and allows every person who pleases to pass over it. He does not even forbid the persons from whom he was obliged to purchase the road to pass over it; and he suffers it to be thus traveled for twenty years. Will it thereby become a public highway, and the commissioners of highways be bound to keep the road and bridges in repair at the expense of the town, or the town be liable to pay all damages which any person may sustain on account of the road or bridges being out of repair? If not, then a road is not made a public highway by reason that every person who pleases travels over it. But if in the case I have put, the road does become a public highway, then the town may be made liable to pay damages or incur heavy expenses to keep the roads and bridges in repair, which the commissioners of highways have never recognized as public highways, which have never been annexed to any road district, or worked at the public expense.

But this is not the only consequence which will follow from holding that travel on a private road for twenty years will convert it into a public highway. In the case I have supposed, a piece of land twenty feet wide has been by process of law laid out as a private road through a man's farm. The man who procured the road to be laid out, suffers all persons to travel over it for twenty years; and if at the end of twenty years it becomes a public highway, the commissioners of highways will be bound to cause it to be opened two rods wide, and the farmer from whom a piece twenty feet wide was taken for a private road,

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will be compelled to surrender another piece twelve feet wide through his farm without compensation, and remove or make new fences, and the man who purchased the private road and always had a right to put bars, or a gate, or a fence across it, may be compelled to surrender his private road without any compensation. A rule which may be followed by such injurious consequences, ought not to be adopted; but if all persons travel over a private road for twenty years, that will not convert it into a public highway. What does the statute mean, which makes it the duty of the commissioners of highways to cause all roads which have been used as highways for twenty years, to be ascertained, described and entered of record in the town clerk's office, and to order the overseers of highways, to open all roads to the width of two rods at least, which they shall judge to have been used as public highways for twenty years? Does every road frequently traveled over for twenty years become a public highway, or does the statute mean that when a road has been recognized as a public highway by the proper officers of a town, by being annexed to a road district, and worked and kept in repair at the expense of the town for twenty years, the town acquires a right to the road? In such cases the commissioners of highways of the present day may generally have record evidence that a road has been used as a public highway for the last twenty years. They can, by searching the records of the town clerk's office, discover whether it has been attached to any road district and put under the care of an overseer of highways: if it has not, there is no reason to believe that the officers of the town whose business it is to attend to the highways have regarded or claimed it as a highway.

Twenty years' use of a road as a highway is, upon the principle of the statute of limitations, evidence of a title to the easement; either by grant or an original laying out of the road, although no record can be found. An adverse possession of an easement for twenty years furnishes evidence of a right to it. By an act passed by the legislature in the year 1784, no public highway was to be less than two rods wide; and hence it is, if a road has been used twenty years as a public highway, the pre-

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sumption is that it is at least two rods wide. And as the twenty years use established the right, the legislature has made it the duty of the commissioners of highways to cause all such roads to be opened two rods wide. The commissioners and overseers of highways are the officers of the town, by whose acts the town is bound. If they have claimed and used a road as a public highway for twenty years, not only the right but the duty of the town is established. The title of the town to the road can not be acquired, and the duty of the town to keep the road and bridges in repair can not be imposed, by the acts of individuals in traveling over the road. The officers of the town have no right to interfere with the travel on a private road.

When a road has been regularly laid out and opened as a public highway, it ceases to be a public highway, unless worked within six years. A highway must not only be opened but worked at the public expense, or the town loses all its title thereto. This shows that work upon the road at the public expense, is material evidence in showing that the road is a public highway.

The counsel for the plaintiffs, upon the argument, insisted that there was a dedication by the owners of the land, of the site of this road, to the public. But there is no evidence of a dedication to the public. There is, however, direct and uncontradicted evidence that it was set apart by the owners of the land for their own accommodation as a private way.

Again, if the town claims on the ground of dedication, it must accept the thing as dedicated. (3 *Kent's Com.* 451.) If a person dedicates a piece of his farm ten feet wide, the party to be benefited by the dedication, has no right to say to the party making the dedication, "you dedicated a piece of land ten feet wide, but as that will not answer my purpose I will take a piece thirty-two feet wide."

The road in question had no mark about it of a public highway; it was only from eighteen to twenty feet wide, and every person who traveled on it is presumed to know that the law required every public highway to be at least two rods wide, and seeing this but eighteen or twenty feet he must know it was not

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a public highway, unless the officers of the town having charge of the highways had been grossly ignorant.

The road of which that in question is a part, extended from the Stillwater road north to the Dunning-street road, but the north part of the road has been cultivated for the last fourteen years, and has not been an open road during that time. The part shut up is about one mile, and that which has been left open about half a mile long. The fact that two-thirds of the road as used twenty years ago has been shut up, and gates and bars placed across it, furnishes strong evidence that it was not used as a public road. The town officers set up no claim to it.

Again, if a traveler enters upon this road at its junction with the Stillwater road, he can travel north on it for half a mile, and come to a gate and to an open road to what is called the Factory, and there are three dwelling houses, and then the traveler comes to the end of the road, and what must he then do? He must go back the way he came to the Stillwater road; or if he wishes to go to the Dunning road he must open one or two or more gates or bars. In these circumstances there is no evidence that this road is a public highway.

"A road leading to any market town, and common for all travelers, *and* communicating with any great road, is a highway; but if it lead only to a church, or to a barn or village or to fields, it is a private way." (1 *Russ. on Crimes*, 308, *note g*.) This road in dispute was intended by Mr. Parks and Mr. Olmstead, to enable them to go to their fields, and that is the purpose for which their representatives now use it. It but leads to a factory and three families, and there it ends.

It does not therefore answer the common law definition of a highway. The motion for a new trial ought to be denied.

Judgment reversed.

[ESSEX GENERAL TERM, July 7, 1851. *Willard, Hand and Cady*, Justices.]

FITCH and others *vs.* BATES.

The assignor of a demand, in an assignment of his property in trust for the benefit of his creditors, can not be a witness for the assignees, in a suit brought by them to collect the demand.

Under the code, if the result of a cause will directly and immediately affect any right or interest of a person proposed as a witness, and adversely if, against the party calling him, he is inadmissible. As where the judgment, *per se*, must necessarily create or take away a right, or enlarge or diminish a fund in which he had a direct interest; or vest in him, or divest him of, an estate.

But if the record only furnishes evidence for or against him, and the effect of the recovery is not direct and immediate, then the objection goes to his credit.

THIS was an appeal from a judgment entered on a report by a referee. The suit was brought by the plaintiffs, assignees of A. & B. Leonard, for the balance of an account claimed to be due from the defendant to A. & B. Leonard, which had been assigned to the plaintiffs. It appeared on the hearing that the assignment to the plaintiffs was for the benefit, generally, of the creditors of the Leonards. One of the plaintiffs, on being called by the defendant, testified that the inventory, on paper, showed enough to pay all the debts; but that he believed the assets were insufficient, and the failure a bad one. The referee decided that the Leonards (the assignors) were competent witnesses to prove the claim. The defendant excepted, and appealed to this court.

G. M. Beckwith, for the defendant.

B. Pond, for the plaintiff.

By the Court, HAND J. It was objected to the competency of the Leonards, the assignors, that they were parties to the record. This is not true in fact. The plaintiffs are styled assignees of the Leonards, in the title, but that style is not adopted in describing the plaintiffs, in the pleadings. Under the code, even, to sue in that form, except where the appointment has been by some judicial proceeding, would be

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rather inartificial. And besides, that would not make the assignors parties to the suit.

Can the assignor of demands in trust for the payment of his creditors be a witness in a suit by the assignee, to collect them? This is the important question in this case.

It can not be pretended that he would have been competent before the code. (*Artcher v. Zeh*, 5 *Hill*, 200. *Carpenter v. Creal*, 6 *Hill*, 556. *Hopkins v. Banks*, 7 *Cowen*, 650. *Cowen & Hill's Notes*, 115. *Cummings v. Fullam*, 13 *Vt. R.* 44. 2 *Greenl. Ev.* § 392.)

But it is said, he is within the provisions of that statute. The construction of § 399, as found in the code of 1849, under which this cause was tried, is not perfectly obvious. Section 396 provides for the examination of a person "for whose immediate benefit the action is prosecuted or defended," though not a party to the action, in the same manner and subject to the same rules as a party. Sections 398 and 399 are as follows: § 398. "No person offered as a witness shall be excluded, by reason of his interest in the event of the action." § 399. "The last section shall not apply to a party to the action, nor to any person for whose immediate benefit it is prosecuted or defended, nor to any assignor of a thing in action, assigned for the purpose of making him a witness."

These sections make a distinction between a person who has an "interest in the event of the action, and one "for whose immediate benefit it is prosecuted or defended." Owing, perhaps, to the haste which necessarily attended the passage of this bill, or to the general and imperfect character of such legislation, twice since it became a law in 1848, there has been a general revision of this code by the legislature, assisted by the commissioners. But the phraseology of these particular passages remained as at first; large additions having been made, however, the last time, to the last section. Perhaps from this, it may be reasonably expected that these clauses of the act will remain, at least until their practical effects shall be known and understood. Too much care, therefore, can not be bestowed to give them a correct construction.

An interest in the event of a suit, naturally includes an immediate benefit to be derived from its prosecution or defense. But § 398 excepts the latter interest, and the present inquiry is, as to the nature and extent of that exception.

There would seem to be no difficulty in understanding what is meant by an interest in the event of an action. "Interest" means concern, advantage, good; share, portion, part, or participation; and "event," "the consequence of any thing, the issue, conclusion, end, that in which an action, operation, or series of operations, terminates." "Benefit," is simply advantage, profit. (*Webster*.) "Immediate," is often used in legal language. Immediate heir, immediate descent, immediate devise, immediate tenant, &c.; all of which are familiar to the bar. (*Dwarr. on Stat.* 776. 2 *Bl.* 226. 8 *Vin.* 83. 14 *Id.* 50.) Bouvier says: Immediate, is that which is produced directly by the act to which it is ascribed, without the intervention or agency of any distinct, intermediate cause. "The phrase, 'immediate interest' is one," says C. J. Tindal, "the meaning of which is now well ascertained." (*Hearne v. Turner*, 2 *M. G. & S.* 543.) And he gives, as instances of incompetency, a tenant, where his landlord is let in to defend; for he may be removed from possession if the defense fails, and therefore, he has an immediate interest in the event; a person who has deposited money with a third person to abide the event of a suit; bail; persons who have made wagers on the event of the suit; which, he says, are instances to exemplify the rule; and adds, that this is the extent to which it has been carried; and he refused to extend it to one who testified that he had nothing to do with the suit, and in which, (an action of trover,) he was called to sustain a plea of title in himself; because, if the defendant succeeded, the witness must resort to an action to obtain his own rights in the matter. At common law, the interest, to disqualify, must be some legal, certain and immediate interest, however minute, in the *result* of the cause; or in the *record* as an instrument of evidence. (2 *Stark. Ev.* 747. 1 *Phil.* 55, 63. *Cowen & Hill's Notes*, 99. *Bent v. Baker*, 3 *T. R.* 26, and notes to that case in 2 *Smith's Lead.*

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Cas. Am. ed.) But a great change has been made in this state by the code ; and as much so, perhaps, in England, by two statutes. (3 and 4 Wm. 4, ch. 43, § 26 ; and 6 and 7 Vict. ch. 85, § 1.) A reference to these provisions, and the decisions under them, may be useful to a right understanding of our own statute. By the first above named English act, if an objection was made to the witness on the ground that the verdict or judgment in the action in which it was proposed to examine him, would be admissible for or against him in another suit, still he was to be examined. But a verdict or judgment in favor of the party calling him was not afterwards admissible in evidence for the witness, or any one claiming under him ; nor against him or any one claiming under him, if against the party calling him. The other statute, which was drawn by Lord Denman, and is usually called his act, took another step, and declared that no one should be excluded by crime or interest, but should be admitted to give evidence, "notwithstanding such person may have an interest in the matter in question, or in the event of the trial of any issue, matter, question or inquiry, or of the suit, action or proceeding" in which he is offered, and notwithstanding he had been convicted of crime. "Provided, that this act shall not render competent any party to any suit, action or proceeding, individually named in the record, or any lessor of the plaintiff, or any tenant of the premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf, any action may be brought or defended, either wholly or in part, or the husband of such person," &c. This last act, it will be observed, does not change the law as to five classes of interests.

Several decisions have been made since these acts took effect, some of which I will notice.

An executor and residuary legatee was admitted to prove the plaintiff's title to a horse, in a suit against a legatee of all the testator's horses, though, if the testator had title and the plaintiff failed, the estate might have to pay the unpaid purchase money for the horse. (*Bowman v. Willis*, 3 Bing. N. C. 669,

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1837.) In *Rees v. Walters*, a remainderman was admitted for a tenant in possession, claiming under him, in an action of trespass. (3 M. & W. 527.) This was merely a question of damages; but it was intimated that the case would have been different if it had been an action of ejectment. But it was held that an annuitant under a will, whose annuity was payable out of the land devised, was not competent, in an action on a bond against a devisee of the obligor; where the question was on the validity of the signature. (*Bloor v. Davis*, 7 M. & W. 235, 1840.) And so with a widow, in an action against an executor *de son tort*, where she was called to prove a bill of sale of the goods to the defendant by the intestate. (*Yardley v. Arnold*, 10 M. & W. 141.) A judgment for the plaintiff would fix a charge upon the assets, to the residue of which she was in part entitled. One who was not when the suit was commenced, but was when the debt was contracted, a member of a joint stock company, was permitted to testify for the defendant, though an execution might be taken out against him, if an execution against the company proved ineffectual. (*Needham v. Low*, 12 Mees. & Welsb. 560.) In *Wilson v. Magnay*, (1 Car. & Kir. 291) and *Wheeler v. Senior* (*Id.* 293,) both in 1844, a sheriff's officer was held to be a competent witness in a suit for neglect to execute process in his hands. In *Girdlestone v. McGowan et al.* (*Id.* 702,) the defendants made cognizance, first as bailiffs of A. and B. and secondly as bailiffs of A. and it was held by Alderson B. after conferring with Lord Denman, that B. was not a competent witness for the defendants, to sustain the second cognizance, though the defendants gave no evidence on the first, and offered to abandon it. This was in 1845, and in the same year it was held that a bankrupt was admissible to prove a petitioning creditor's debt; (*Udall v. Walton*, 14 M. & W. 254;) that a *prochien ami* might be a witness for the plaintiff; (*Sinclair v. Sinclair*, 13 M. & W. 640;) and that a husband could be a witness for his deceased wife's administrator, in a suit on a note given to her while *feme sole*. (*Hart v. Stephens*, 6 A. & El. N. S. 937.) *Hill v. Kitching*, was tried before Tindall, C. J. (2 Car. & Kir. 278,) and a new

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trial denied in C. B. (3 *Man. G. & Sc.* 299, 1846.) The suit was by a ship broker for his commission; and one, who stated he had nothing to do with the negotiation, and had no claim on the owner of the vessel, but expected, pursuant to an arrangement with the plaintiff and the custom among brokers, to receive half that the plaintiff might recover, he having introduced the plaintiff to the defendant, was held competent. And in *Hearne v. Turner*, (2 *Id.* 535,) in trover for notes, the defendant pleaded that A. owned the notes, and that they were fraudulently obtained from him, and wrongfully delivered to the plaintiff, and that the defendant, by A.'s direction, took them; the issue being on property in A. The latter was held a competent witness for the defendant. In *Belcher v. Drake*, Wilde, C. J. held, in an action by the assignees of a bankrupt, who was not called as a witness, that his statements with regard to his affairs might be proved; but he rejected a creditor under the fiat. (2 *Car. & Kir.* 658.) And in *Thorpe v. Barker et al.* (5 *M. G. & Scott*, 675,) a defendant in trespass, who had suffered default, was not allowed as a witness for his co-defendant, on the trial of an issue against one, and assessment of damages against the witness at the same time. But Pollock, B. held a petitioning creditor to be a good witness to support the fiat, in an action of trover by the assignees. (*Johnson v. Graham*, 2 *Car. & Kir.* 808, 1848.) In *Sage v. Robinson*, (3 *W. H. & G.* 141,) a witness, one Smith, was admitted under these circumstances. The action was for money had and received. The defendant, an auctioneer, had sold an omnibus with which the plaintiff had intrusted him, the avails of which the plaintiff claimed, and so did Smith, the latter claiming that the plaintiff had sold it to him before the defendant had disposed of it; Smith, on being called, testified "I indemnified Robinson. Robinson said at first, he would defend the action; I said, I will share the loss."

These cases are sufficient to show the difficulty that the English courts have found in giving a construction to these statutes. In *Bowman v. Wills*, Tindall, C. J. said, there was "no immediate benefit" resulting to the witness from the termination of the suit, one way or the other; and that it was only on the sup-

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position of a subsequent action, &c., that his interest arose. In *Rees v. Walters*, the result could not change the possession. In *Bloor v. Davis*, the annuitant was directly interested to protect the land on which her annuity was charged. In *Yardley v. Arnold*, the widow was interested to prevent a recovery that would be a charge upon the assets. Parke B. said, an interest in the event of a suit, was some direct, immediate and necessary consequence, prejudicial to her interest," flowing from a verdict for the plaintiff, while from the verdict the other way, a corresponding benefit would result to her. These cases were before Lord Denman's act. In *Needham v. Law*, which was afterwards, Lord Abinger, C. B. said, he would be incompetent if he had an immediate interest in the event of the suit. But the former stockholder's interest was too remote. In *Wilson v. Magnay*, and *Wheeler v. Senior*, both cases after Lord Denman's act, the sheriff's officer was held competent because, as Wightman, J. said, the suits were not for the "immediate benefit" of the witnesses, as they could only be made liable through the medium of another action. *Girdlestone v. McGowan et al.* went off upon the exception in the act as to cognizances. In *Hart v. Stephens*, it was not shown that there would be any surplus after paying the debts of the deceased wife; and it was held that, though he had a possible benefit from his wife's estate, he was admissible, at least under Lord Denman's act. The court seem to have taken a view of the nature of his interest, somewhat different from that entertained by this court, in *Woods v. Williams*, (9 John. 123.) And it seems to me, that the husband, in *Hall v. Stephens*, stood very much in the position of a child or other distributee, in case of intestacy, or a residuary legatee. Perhaps, however, more in relation to the estate, should have been shown. (*Duel v. Palmer*, 4 Den. 511.)

Tindall, C. J. said at *nisi prius*, in *Hill v. Kitching*, that there was no contract between the witness and defendant; his claim was solely on the plaintiff, and his position was like one who had made a wager upon the result of the action. That the suit was not in his behalf, but his only resource was to bring

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an action. When the cause came before the whole court, he again stated, that if it had appeared that the plaintiff had made over a moiety to the witness, then he should have said he was a person in whose immediate and individual behalf the suit was brought. But his claim was under a separate and distinct agreement, and there was no evidence to show he was a party to bringing the action. And Coltman, J. remarked, it appeared to him, "that the party, 'in whose immediate and individual behalf the action is brought,' must mean the party who causes the action to be brought;" taking, it seems to me, a very narrow view of the matter. Maule, J. thought the proviso excluded the plaintiff on the record, and any person who, though not the formal plaintiff, is substantially so; as an assignee of a bond in a suit in the name of the assignor. And in *Hearne v. Turner*, as we have seen, tenants in suits by landlords, depositors of money depending upon the event of a suit, bail, &c. were said to be inadmissible. In *Sage v. Robinson*, Pollock, C. B. said, "whenever the witness would, under the old law, have been rendered competent by release, he is now competent without one; that I consider a good test." And Alderson, B. said, "when the interest arises out of a bargain, how can it be said to be immediate? The bargain is intermediate. In the case of ejectment the interest is immediate, because the effect of the judgment is to turn the party, called as a witness, out of possession. Here the judgment has no effect upon the witness."

Under our code it has been held, that one, who had assigned his stock in a plank road company for the purpose of being a witness, but had no interest, was competent. (*Ham. and Deansville Plank Road Co. v. Rice*, 7 Barb. 157.) And so of the assignee of a note. (*Everts v. Palmer*, *Id.* 178.) They had no interest and would have been admissible before the code. It would have been different, it seems, if they had remained interested. (*Gridley*, J. 7 Barb. 162.) In *Mesick v. Mesick*, (7 *Id.* 120,) legatees who appeared by counsel and were contesting the account of the executor on final settlement, were held incompetent, though on being offered they assigned all their claims upon the estate. Both in this country and in England there has been

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much contrariety of opinion on the admissibility of a co-party. (*Selkirk v. Waters*, 5 *How. Pr. Rep.* 296. *Mech. & Far. Bank v. Rider*, *Id.* 401. *Safford v. Lawrence*, 6 *Barb.* 566. *Dodge v. Averill*, 5 *How. Pr. Rep.* 8. *Pack v. Mayor of N. Y.* 3 *Comst.* 489. *Norton v. Woods*, 5 *Paige*, 249. *Mills v. Lee*, 4 *Hill*, 549. *Perk. Coll. on Part.* § 810. *Bates v. Conkling*, 10 *Wend.* 389. *Scott v. Loyd*, 12 *Pet.* 145. *Cook v. Spalding*, 1 *Hill*, 256. *Thorpe v. Barber et al.* 5 *M. G. & S.* 675.) But that question does not directly arise in this cause; for, as we have seen, the Leonards are not, in fact, parties to the record.

It is clear from this review of the authorities, which, however, throw some light upon the question before us, that the law is yet far from being wholly settled, here or in England. And I am inclined to think our statute extends but little further than that of 3 and 4 W. 4, which we have seen, was confined mainly to cases where the record would be evidence for or against the witness, or those claiming under him. The intimation of some of the English judges, that *Ld. Denman's* act admits every one, not actually participating in the prosecution or defense of the action, is very questionable, as it is pretty obvious that the proviso is more extensive in its operation; and perhaps it will result in making an immediate benefit the criterion. However that may be, the test here is, whether the benefit is immediate. Participating in the prosecution or defense, unless so as to be made liable for costs, is not enough. Indeed, if one declines to interfere, or even discountenances the suit, still, if it is for his immediate benefit that the party calling him should succeed, he is not competent. And such is substantially the result in England. The phrases "immediate benefit," and "immediate interest," have been in common use. "A certain, direct and immediate interest." (1 *Phil. Ev.* 63.) "Immediate interest." (2 *Stark. Ev.* 744.) *Tindall, C. J.* in *Doe v. Tyler*, (6 *Bing.* 385,) where a remainderman after tenant in tail, was held incompetent for the tenant in tail, in ejectment for the entailed property, after stating Chief Baron Gilbert's rule as to competency, (*Gilb. Ev.* 106,) said: "Now this benefit may arise to the wit-

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ness in two cases ; first, where he had a direct and immediate benefit from the event of the suit itself ; and secondly, where he may avail himself of the benefit of the verdict in support of his claim in a future action ; and where the case falls within the first description, in which the interest is more immediate and direct, there is no occasion to have recourse to the second principle, where the interest is one degree removed." And he puts the case of a residuary legatee, called for the executor in a suit for a debt due the testator ; " not because the verdict would be evidence for or against him in the first suit, for he can neither be plaintiff or defendant in an action relating to this debt, but because he receives an immediate benefit by a verdict for the plaintiff." So of a tenant in possession, called for the defendant, his landlord. And the case of *Doe v. Tyler*, afforded another example of immediate benefit. For, by the recovery, the tenant in tail would have been *in* as of his former right, and therefore the witness, the remainderman, would have acquired a vested interest in the remainder in tail ; for the seisin of a tenant in tail in possession, is the seisin of the remainderman ; and therefore the witness had " a direct and immediate interest" in procuring a verdict. This case was decided before either of the English statutes to which I have referred, but it is an example that elucidates the expression, " immediate benefit." The witness offered was ninety years old, and the lessor of the plaintiff had sons and grandsons. Consequently, the probability of the witness ever enjoying the estate, if recovered, was very remote. In *Artcher v. Zeh*, (5 *Hill*, 202,) the court held that an assignor of a chose in action by way of collateral security for his debt, could not be a witness for his assignee, without a release. " A failure to recover," says Cowen, J. " would, of course, have been his loss to a corresponding extent." And a defeat of the assignee, on the merits, would bar any action by the assignor.

I think, under our statute, if the result of the cause will directly and immediately affect any right or interest of the person proposed as a witness, and adversely if against the party calling him, then he is inadmissible ; as where the judgment, *per se*, must necessarily create or take away a right, or enlarge or

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diminish a fund in which he has a direct interest, or vest in him or divest him of an estate. But if the record only furnishes evidence for or against him, and the effect of the recovery is not direct and immediate, then the objection goes to his credit.

Applying this rule; this suit was prosecuted for the immediate benefit of the Leonards. They were interested to protect and increase the fund devoted to extinguish their indebtedness. If they were solvent, a recovery would increase their surplus; and if they were not, it would lessen their liability. And even applying the test suggested by Pollock, C. B. in *Sage v. Robinson*, they were not competent, and could not have been, though the witnesses and the plaintiffs had interchanged releases; for the assignees are not the only creditors. A release from the other creditors interested was necessary. The judgment entered upon the report of the referee must be set aside; the costs of the defendant on this appeal to abide the event.

Judgment reversed.

[ESSEX GENERAL TERM, July 7, 1851. *Willard, Hand and Cady, Justices.*]

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A motion to set off judgments obtained in a justice's court, transcripts of one or both of which have been filed with the county clerk, will not be entertained in this court; the county court having full power in such cases.

A motion to set off a judgment must be made in the court where the judgment against the moving party was obtained.

A constable, after he has returned an execution satisfied by sale, can not afterwards annul that return, by a supplementary indorsement on the execution that the defendant has sued and recovered for the property

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MOTION by Ross to set off two judgments against each other, originally recovered in a justice's court. Ross had a judgment against Hicks, on which a horse had been sold. Hicks sued Ross for the horse and recovered, on the ground that it was

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exempt from levy and sale. The following is the substance of the affidavits.

On the part of Ross, two of the jurors in *Hicks v. Ross* swore they gave a verdict for the value of the horse. That it appeared the horse was part of Hicks' team; and that the officer had tendered the surplus, after paying execution, which Hicks had refused. One Vaughn swore he was constable, and in October, 1850, had an execution issued by Howden a justice, in *Ross v. Hicks*, for \$34,46, and Hicks turned out a stud horse, twenty sheep and a cow. That Hicks had 3 horses then. That he sold the horse for \$17,90 more than enough to pay Ross, which sum Hicks would not take, and he left it with one Underhill, giving information to Hicks that it was there to his order. That Hicks sued Ross and recovered the value of the horse.

Underhill swore the balance, \$17,90, was deposited with him by the constable. Afterwards Hicks claimed it and he paid it to him, not knowing but he had a right to it.

The attorney of Ross swore that the transcript in *Ross v. Hicks* was filed February 6, 1851, in the Clinton county clerk's office. That after the sale Hicks recovered of Ross \$56,38 for the horse, beside costs, a transcript of which was filed 25th January, 1851, and execution had been issued. That after the verdict, Hicks took the money from Underhill. That he demanded of Hicks that he should apply the \$17,90 on the judgment in *Hicks v. Ross*, and offered to pay him the balance. That again in July, 1851, he asked Hicks to apply the surplus money on his judgment and he would pay the balance. Hicks replied, "show me the money and I will answer."

On the part of Hicks, Vaughn swore that he returned the execution to the justice, satisfied, after the sale and before Hicks sued; and afterwards made a supplementary return of the facts thereon.

Hicks swore that he turned out the horse, cow and sheep on condition the constable would sell them before the door of Ross. That the judgment was unjust, and he did not know as the horse was exempt when he turned it out. That he wanted the constable to sell the cow, and he would pay the balance, and on

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the day of sale he forbade the sale. That the horse sold for \$55,00, after which he prosecuted Ross and recovered for the horse, besides costs. That he received the money of Underhill by advice of counsel and as a matter of prudence. That Ross's attorney never tendered the balance as he stated, but pretended he would. That the judgment was satisfied by the sale.

F. A. Hubbell, for the motion.

P. G. Ellsworth, contra.

HAND J. There is no doubt as to the equity in this case. Hicks turned out the horse upon which the constable made the levy. He could not afterwards take the horse from the officer, by pretending he was mistaken as to the law. But that is not important now, for he sued Ross notwithstanding, and got judgment for about \$60, which is conclusive as to the right. He then immediately went to the depositary and got the overplus of the money before tendered to him, and which was raised by the sale of the same property. This he says he did by the advice of counsel and "as a matter of prudence;" and now leaving his debt unpaid, is endeavoring to enforce the whole of this judgment. After the sale, and return of the execution by the constable satisfied, he could not, because of the recovery for the property by Hicks, make a supplementary return of that fact, that would revive the judgment. Nor could the justice, it seems, make the amendment. (*Piper v. Elwood*, 4 Denio, 165.) And I am inclined to think Ross could not file a transcript while the judgment was *prima facie* satisfied. If the judgment in such case can be made a lien upon land at all, it must be by filing a transcript of the judgment, execution and return, and then procuring the county court to amend the return, &c. But I have no doubt that the proper court, notwithstanding this return, could and should set off these judgments, and also apply the overplus money. In truth the judgment against Hicks is not paid, (*Piper v. Elwood*, *supra*,) and these applications are to the discretion and equitable jurisdiction of the

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court; and where the facts are admitted and the court has jurisdiction, justice should be done if it can be, without violating any plain rule of practice. Hicks admits that he turned out the property that was sold, that he afterwards recovered for the same and then received the overplus money. There is no dispute about facts; so there is no intricacy or complexity, and the case does not come within the principle of *Harris v. Palmer*, (5 Barb. 105.)

But there is an insuperable difficulty in the way of the motion. It has long been the practice to set off one judgment against another, in a proper case. And this, where they are in different courts, if the parties are interested in the respective judgments in the same right, and the judgment is conclusive, and the rights of the parties are not doubtful, complicated or intricate. (*Barb. on Set-off*, 36. 1 *Burr. Pr.* 281. *Mont. on Set-off*, 67, and notes. *Schermerhorn v. Schermerhorn*, 3 *Cuines*, 190. *Brewerton v. Harris*, 1 *John.* 144. *Bristowe v. Needham*, 7 *M. & G.* 648. *Bridges v. Smith*, 8 *Bing.* 29.) And this rule extends to a judgment in a justice's court. (*Ewen v. Terry*, 8 *Coven*, 126. *Kimball v. Munger*, 2 *Hill*, 364. *Story v. Patten*, 3 *Wend.* 331. *Harris v. Palmer*, *supra.*) But the motion must be made in the court where the judgment against the moving party was obtained. (*Cooke v. Smith*, 7 *Hill*, 186. *Brewerton v. Harris*, 1 *John.* 144. *People v. New-York C. P.* 13 *Wend.* 652. *Dunken v. Vandenburg*, 1 *Paige*, 624.) Hicks having filed a transcript with the clerk of the county of Clinton, the Clinton county court has full power, whether the judgment in favor of Ross be considered in that court or not. (2 *R. S.* 254, § 166. *Code of 1849*, §§ 30, 63, 64.) If the judgment to be enforced against the moving party be in another court, an order in his favor could not be enforced except by attachment. The ground of interference in these cases is "the general jurisdiction of the court over the suitors in it." (*Lord Kenyon in Mitchell v. Oldfield*, 4 *T. R.* 123.) Neither of the parties in this case are suitors in this court; nor are either of the judgments in this court. And they can not be set off here; certainly not on motion. Mr. Justice

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Wells, in *Harris v. Palmer*, did not observe upon this rule, but that was not necessary, as he denied the motion on other grounds.

Of course it becomes unnecessary to decide whether affidavits of jurors can be used to explain the principles upon which they find a verdict. (*Graham on N. T.* 111 *et seq.*)

The motion must be denied with costs, but without prejudice to the right of Ross to move in the Clinton county court.

[CLINTON SPECIAL TERM, July 14, 1851. *Hand Justice.*]

 TYLER vs. STEVENS.

Where the payee of a note indorsed the same to the defendant, and the latter transferred it to the plaintiff, for a valuable consideration advanced by him at the time, the defendant executing upon a separate paper a guaranty of the payment of the note, but the *guaranty expressed no consideration*; *Held*, that the guaranty, being supported by a consideration *in fact*, independent of the note, was valid; but that if not collectable as a contract of guaranty, the plaintiff was entitled to recover on a count for money lent and advanced, upon the implied assumpsit.

In an action upon such a guaranty the defendant may show that the note has been paid. But evidence that money or property has been delivered by the indorser to the plaintiff, without showing an understanding that it should be applied upon the note, will not authorize a legal presumption of the satisfaction of the note by the indorser.

THIS was an appeal by the defendant from a judgment of the county court of Lewis county, affirming the judgment of a justice of the peace in favor of the plaintiff.

On the 6th of October, 1841, Charles R. Milks made a promissory note as follows:

"Ninety days from date I promise to pay to the order of Joseph Keifer, thirty-five dollars and seventy-one cents, at the Bank of Lowville."

The payee indorsed the note to the defendant, and the defendant transferred the same to the plaintiff, at the same time exe-

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cuting to him a guaranty on a separate paper, of which the following is a copy: "I guaranty the payment of a note of \$35, ~~77~~⁷⁷ face, payable at the Lowville Bank, signed by Charles R. Milks and indorsed by Joseph Keifer, dated October 6th, 1841."

This suit was commenced before the code took effect, and the declaration therein contained counts upon the guaranty, and for money lent and advanced. On the trial the defendant was sworn as a witness and testified as follows: "I delivered the guaranty in question to Tyler (the plaintiff,) I sold him Milks' note and received from him \$35. I received the \$35 when I delivered the guaranty, as the consideration for the execution and delivery of the guaranty and the sale of Milks' note."

The defendant resisted a recovery, on the ground that the guaranty expressing no consideration was void, and that the proof of a consideration in fact was not sufficient to take the case out of the statute of frauds.

D. M. Bennett, for the plaintiff.

J. Mullen, for the defendant.

By the Court, HUBBARD, J. It was insisted on the argument by the plaintiff's counsel that this guaranty imported a consideration, because it was a guaranty of *payment*. There is no authority to sustain this position. This guaranty, it must be borne in mind, was made *after* the making of the note by Milks, and upon a consideration or inducement having no connection with the contract embraced in the note. It was in consideration of an advance of \$35, in money, by the plaintiff to the defendant, at the time of the transfer of the note. All the cases referred to by the counsel, are cases of guaranties made simultaneously with the note, as one transaction, and the consideration which supports the promise of the maker of the note, has been held to furnish sufficient aliment to support the guarantor's promise of payment, and that the guaranty made under such circumstances may be regarded as in legal effect a promissory note, and

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collected as such, although no consideration is expressed. (*Hunt v. Brown*, 5 *Hill*, 145.) Those authorities therefore, can have no application to this case, and it will be unnecessary to question the soundness of the doctrine which they maintain. I may be allowed to say, however, that the once favorite theory of avoiding the statute of frauds, by construing a guaranty of payment into a promissory note, by the circumstances under which it was made, has not received the entire approval of recent adjudications.

This action, however, can be sustained upon two grounds. 1st. The guaranty is valid, because supported by a *consideration in fact*, independent of the note; and 2d. If not collectable as a contract of guaranty, the plaintiff is entitled to recover on his count for money lent and advanced, upon the implied assumpsit.

Since the leading case of *Leonard v. Vredenburg*, (8 *John*. 29,) it has been repeatedly held that a consideration distinct from the liability of the maker of the note may be shown, to uphold a guaranty. So in this case it was competent to prove that this guaranty was made in consideration of an advance of money by the plaintiff to the defendant, to show that it was but a mode of payment of the debt of the defendant then contracted; that his contract of guaranty was not *collateral* to the promise of the maker of the note, but was an *original undertaking*, and hence not a *special* promise to answer for the debt of another. In the case of *Johnson v. Gilbert*, (4 *Hill*, 178,) it was distinctly held that the statute of frauds applies only where the promisor stands in the relation of surety to some third person, who is the principal debtor; that a guaranty, although it expressed no consideration, could be upheld by proving a new and independent consideration. That case was like this, in its essential facts, and it will be unnecessary to cite other authorities on this subject. There are no reported cases to my knowledge, contravening this doctrine. In the court of appeals, this rule of law has recently been questioned by a learned minority of that court, and not without much reason and strength of argument. (*Brown v. Curtis*, 2 *Comst.* 225. *Durham v. Manrow*, *Id.* 533.) But the principle of the case of *Johnson v. Gilbert*, above referred

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to, was distinctly sustained in the decision in each of those cases. So that unquestionably the law of this case is, that this guaranty is valid, being upheld by the advance of the money by the plaintiff to the defendant at the time it was made.

If this was an open question, I should be inclined to hesitate before submitting to this doctrine. In form this guaranty is within the statute of frauds. It is in terms a contract to answer for the debt of Milks, and there is nothing about it from which an inference of an original promise can be drawn. The statute clearly pronounces it void, but still parol evidence is allowed, to infuse a new element, to give it vitality; to change materially the nature and operation of the writing—changing it from an apparently collateral into an original undertaking. This is allowed upon the principle of giving effect to the supposed intention of the guarantor, and to prevent a failure of his contract. Why this principle should be applied to this species of writings, while it is withheld from perhaps every other, it is difficult to perceive. The guarantor is thereby subjected to an entirely different contract from that which the writing literally imports, and a violation as it appears of that salutary rule of law, which regards the unambiguous written agreement of the parties as controlling and defining their rights under it. Had the courts, in their solicitude to prevent an entire failure of the contract, required the holder of such a guaranty to resort to his original consideration on which the invalid guaranty was based, it would have been more in harmony with the statute, and violated no settled rule of law.

On the second point, there can be no doubt of the plaintiff's right to recover upon an implied assumpsit for the money which he advanced as the consideration of the guaranty. If the guaranty is invalid, his claim for money loaned is existing. The verdict of the jury does not appear to exceed the amount of that claim and interest. In the case of *Durham v. Manrow*, before referred to, Judge Jewett, in speaking of the case of *Brown v. Curtis*, says in substance, that case is well sustained, not on the guaranty, for that was void, but the evidence showed a right to recover on the money counts.

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The remaining question raised upon the argument was in relation to the offer and rejection of evidence on the trial. The proposition of the defendant was to prove that Keifer, the indorser, had advanced money and delivered property to Tyler. It was objected that such evidence was immaterial, unless *it had application to the note in question*. The objection was sustained, but the court allowed the defendant to show that the note had been paid, which of course would satisfy the guaranty; but at the same time holding that evidence of general dealings between the indorser and the holder of the note was immaterial and inadmissible. In this ruling there was no error; evidence that money or property had been delivered, without showing an understanding that it should be applied upon this note, would not authorize a legal presumption of the satisfaction of the note by the indorser; and particularly could no such implication arise in this case, for the reason that as Keifer, the indorser, was not charged by protest, he was under no legal obligation to pay. At least I infer he was not charged, although there was no evidence on the subject, in the case; because that fact was made a ground of argument by the defendant's counsel for the reversal of the judgment: and as to that ground it is sufficient to remark that it is unavailing here, for the reason that it was not assumed on the trial in the court below. Had it been, perhaps the plaintiff might, if necessary, have obviated the objection by proof.

The judgment of the county court must be affirmed.

[ONEIDA GENERAL TERM, JANUARY 6, 1851. Pratt, Gridley, Allen and Hubbard, Justices.]

LOUNSBURY vs. PURDY.

The plaintiff, a married woman, having some means of her own, with which she wished to purchase a home for herself and family, a house and lot were purchased by the defendant and Q. who acted as her friends and advisers ; the parol agreement being that Q. should take the deed as her trustee, and hold the property for her use and benefit. The purchase money was accordingly paid by the plaintiff, and Q. took an absolute and unconditional conveyance of the property to himself, containing no intimation of the uses to which the estate was to be devoted, or of the trusts under which the title was taken and was to be held. The plaintiff went into and had ever since remained in possession. The premises were subsequently sold under a judgment against Q. and the defendant became the purchaser, at the sheriff's sale, and he claimed to hold the same, for his own benefit, by virtue of such purchase, and of a judgment held by him against Q. *Held*, that in respect to the purchase at the sheriff's sale, the defendant was a purchaser with notice of the equitable estate of the plaintiff ; and that in respect to his own judgment, he was a creditor seeking satisfaction out of property to which his debtor had no equitable title. And he was directed to release to the plaintiff his interest in the premises, and was enjoined from setting up any claim thereto, under the sheriff's sale, or either of the judgments. The lien of a judgment does not in equity attach upon the mere legal title to lands, existing in the defendant, when the equitable title is in another person.

And if a purchaser, under the judgment, has notice of the equitable title, prior to the purchase and the actual payment of the purchase money, he can not protect himself as a bona fide purchaser.

MOTION for judgment upon a special verdict rendered at the Westchester circuit, and upon the case reserved for further argument and consideration. The complaint alledged that in the year 1846, the plaintiff, Catharine Lounsbury, wife of Henry Lounsbury, being in the possession of some money which had been received by her from the estate of her deceased father and grandfather, and in the expectation of further receipts from the same source, she was induced to invest the same in the purchase of a house and lot, consisting of three acres of land, situate at Ossening, in the county of Westchester. That the negotiations for the purchase of the said property, were made principally by the defendant, Joshua Purdy, with the assistance of the plaintiff's husband, Henry Lounsbury. That the plaintiff

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being a married woman, proposed to the defendant to take to himself the legal title of said property, in trust for her, and to hold the same for her benefit. That the defendant advised her to have the deed taken in the name of Clements Quereau. That Purdy made the agreement with Merritt, the owner of the property, for the purchase thereof; the consideration being \$1000. That he then called upon Quereau, and advised him to take the deed in his name, in trust for the plaintiff, to which Quereau assented. The deed was accordingly executed to Quereau, on the 23d of May, 1846, a part of the consideration being paid at that time by the plaintiff, in the presence of the defendant. That for the remainder of the purchase money, the defendant and Quereau gave their promissory note to Merritt, which was subsequently paid by the plaintiff. That immediately after the execution of said deed, the plaintiff, with her husband and family, went into possession of the premises, and had ever since remained, and was still in the possession, and claimed to be solely beneficially interested in the same; and that she had made very considerable improvements thereon, with her own money. That the deed was soon after its execution, recorded, and delivered to the plaintiff, and had ever since remained in her custody. That although such deed was taken in the name of Quereau, and although it did not appear upon the face of said deed, but that the property was conveyed to the said Quereau in his own right, yet in fact the same was conveyed to him as trustee of the plaintiff, and for her use and benefit. That Quereau never claimed any beneficial interest in said premises; and that the said Purdy well knew the facts to be so, and well knew that all the moneys paid upon the purchase, were the moneys of the plaintiff, and well knew that the plaintiff was in possession of said premises as the beneficial owner thereof. That on the 16th of June, 1848, Quereau, by a deed duly executed and acknowledged, conveyed to the plaintiff the legal title to said premises, so that she now holds both the legal and equitable title to the same; that on the same day, Quereau, by an instrument duly executed, under his hand and seal, acknowledged that he had purchased the premises in trust, to

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and for the use and benefit of the plaintiff, and that the moneys paid therefor were the moneys of the plaintiff, and had been advanced to him for that purpose. That on the 10th of May, 1848, one Samuel L. Mott obtained a judgment against Quereau, in the supreme court, for the penalty of a bond, conditioned to pay \$700, and for \$17 damages and costs. That on the 15th of May, 1848, the defendant obtained a judgment against Quereau, by confession, for the penalty of a bond conditioned to pay \$600, and for \$17,25 damages and costs. That such judgments were not obtained for or on account of any matter connected with such trust. That under and by virtue of executions issued upon said judgments, the sheriff of Westchester advertised the premises in question to be sold on the 17th of August, 1848; that on the day of sale, and immediately after the sheriff opened the sale, the plaintiff gave a written notice, which was read to the sheriff and to all the persons present, of the facts in respect to her interest in the property, and forbade the sale. That the defendant was present, and heard said notice read. That notwithstanding the same, the sheriff, by the directions of the defendant or his attorney, proceeded to a sale of the property, and the same was struck off to the defendant for the sum of \$500. That the defendant subsequently received a certificate of the sale from the sheriff, and now claimed to have an interest in the property, under and by virtue of said sale, in hostility to the plaintiff, and in defiance of her claims. The plaintiff prayed that the cloud which the defendant had thrown upon the title might be removed, and that he might be compelled to release all interest in the premises, which he might claim to have under and by virtue of the sale under the executions; and might be perpetually enjoined from setting up any claims to the same, under and by virtue of the said sale to him, and for other and further relief.

The defendant put in an answer, denying most of the material facts alledged in the complaint, and insisting that he bought the property in question for his own use and benefit, and afterwards sold it to Quereau. A replication was filed, and proofs were taken. The cause was tried at the Westchester circuit in April,

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1851. The jury brought in a special verdict, by which they found that Quereau purchased the premises in question, under a parol agreement to hold the same in trust for the use and benefit of the plaintiff. That the premises were purchased and paid for with the plaintiff's own money. That at the time the defendant purchased the premises at the sheriff's sale, he had notice that the plaintiff claimed to be the owner of the property. That from the time of the purchase of said premises by Quereau from Merritt, the plaintiff had been in the actual occupation thereof, under the arrangement; that Quereau purchased and held the same in trust for the plaintiff, and that the defendant knew of such arrangement when the same was first made.

O. J. Coffin, for the plaintiff.

R. R. Voris, and *F. Larkin*, for the defendant.

BROWN, J. The facts established upon the trial of this action, disclose a design on the part of the defendant to appropriate a dwelling house and three acres of land, situate in the town of Ossening, in the county of Westchester, purchased for the plaintiff and with her means, to the payment of a debt due to him from one Clements Quereau, and another debt due from Quereau to one Samuel L. Mott. This, I think, he can not be suffered to do; for unless I am mistaken, the law is armed with sufficient power to prevent so flagrant an act of injustice. He can not be regarded as a creditor without notice, nor as a bona fide purchaser, for the jury affirm by their verdict, which is entirely in accordance with the evidence, that he was cognizant of the objects and purposes for which the house and lot were purchased; that the consideration was paid with the plaintiff's own money, and that Quereau was to take and hold the title for her use and benefit. He had notice also at the time of the sheriff's sale, that she claimed the property under the deed and declaration of trust, executed by Quereau to her. The proof upon the trial was, that the defendant negotiated the purchase of the

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property for her, and suggested that Quereau should take the deed in his own name, and hold the premises as her trustee.

The lien of a judgment does not, in equity, attach upon the mere legal title to lands existing in the defendant, when the equitable title is in another person. And if a purchaser under the judgment has notice of the equitable title, before the purchase and the actual payment of the purchase money, he can not protect himself as a bona fide purchaser. (*Ells v. Tousey*, 1 *Paige*, 280. *Northrup v. Metcalf and others*, 11 *Id.* 570. *Averill v. Loucks*, 6 *Barb. S. C. R.* 19.) The defendant insists that the case falls within that provision of the statute of frauds declaring that trusts or powers over or concerning lands, shall not be created unless by act or operation of law, or by deed or conveyance in writing. (2 *R. S.* 69, § 6.) It must be remembered, however, that the plaintiff has had the actual possession of the premises since the execution of the deed to Quereau, claiming the beneficial interest therein, and that she paid the whole of the purchase money. I think it will presently appear, notwithstanding the form of the deed, that a trust does arise by act and operation of law.

The jury also affirm by their verdict, that Quereau, the judgment debtor, purchased the premises under a parol agreement to hold them in trust for the use and benefit of the plaintiff. The proof shows the nature of, and the reasons for entering into this parol agreement. She was a married woman and about to receive certain moneys from the estates of her father and grandfather, which she intended should be applied to the purchase of a house and a small piece of land, as a home for herself and family, her husband being unable, in consequence of pecuniary embarrassments, to provide a suitable and permanent residence for her. The house and lot in question were purchased by the defendant and Quereau, who acted as her friends and advisers, to carry into effect this intention; and the parol agreement was that the latter should take the deed as her trustee and hold the property for her use and benefit. She seems to have reposed the most entire confidence in their honesty, as well as in their knowledge and ability, to make the purchase and take such a

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conveyance as should assure her the enjoyment of the property, and accomplish the end she had in view. No attention seems to have been bestowed upon the form of the deed. She gave no direction in respect thereto; and does not seem to have been present when the purchase was consummated and the deed given. And she appears never to have been aware that there was any omission in the form of the conveyance, or any thing wrong in the manner of transferring the title, until the event occurred which gave rise to this action. The purchase money was her own exclusively; the purchase was made for her exclusively, and she immediately went into, and has from that time to the present, enjoyed the exclusive possession. Yet the deed contains no intimation of the uses to which the estate was to be devoted, or of the trusts under which the title was taken and was to be held, but it is an absolute and unconditional conveyance of the entire estate to Quereau. The defendant therefore insists that, inasmuch as the deed of conveyance is absolute upon its face, and the trust exists only by parol, the house and lot became the property of Quereau in fee, and is subject to the lien of the judgments mentioned in the answer, and to be sold for the payment and satisfaction thereof.

The trust was certainly not created by deed or conveyance in writing, and it remains to be seen whether it may not have been created by implication or operation of law, within the meaning of the sixth and seventh sections of the act concerning "fraudulent conveyances and contracts relative to lands." (2 R. S. 69.) Uses and trusts, except as authorized and modified in art. 2, tit. 2, chap. 1, part 2, of the revised statutes, are abolished. A trust like that contemplated by the parties in this action, to wit, that Quereau should hold the estate for the use and benefit of the plaintiff, is not one of those enumerated in the 55th section, and is not therefore one of the express trusts recognized by the statute. Had the deed given expression to the intention of the parties, by a limitation of the estate to the use of Catherine Lounsbury and her heirs, no trust would have been created. Quereau, however, would not have taken the estate, and the lien of the judgments would not have at-

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tached upon the land. The object of the statute is to forbid the creation of trusts merely nominal and not connected with some power of actual disposition and management. At the common law, the legal estate might have been in one person, while the equitable estate—the right to the possession and the enjoyment of the rents and profits—was in another. Both are now united, by operation of the statute, in one and the same person. This it does, not by merging the equitable into the legal estate, but by transferring the legal estate to the person having the beneficial interest, or entitled to the rents and profits. Thus, had the deed to Quereau contained the limitation that he should hold the estate upon trust for the use and benefit of the plaintiff and her heirs, and to suffer and permit her and them to enjoy the possession and to take the rents and profits to their own use, he would have taken no interest or estate whatever, but the plaintiff, by force of the 47th section, would have been deemed “to have a legal estate therein of the same quality and duration, and subject to the same conditions as her beneficial interest.”

But the defendant insists that the grant being made to Quereau, although the consideration money was paid by the plaintiff, it falls within the provisions of the 51st section, which declares that in such case “no use or trust shall result in favor of the person by whom such payment shall be made, but the title shall vest in the person named as the alienee in such conveyance,” subject to the claims of the creditors of the person paying the consideration money, and a trust shall result in favor of them to the extent that may be necessary to satisfy their just demands. The present case, however, is saved by the qualification contained in section 53, which is, that the provisions of the 51st section, “shall not extend to cases where the alienee named in the conveyance shall have taken the same as an absolute conveyance in his own name, without the consent or knowledge of the person paying the consideration, or when such alienee, in violation of some trust shall have purchased the land so conveyed, with moneys belonging to another person.” These are the trusts arising by implication or operation of law, referred

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to in the 6th and 7th sections of the statute in regard to fraudulent conveyances and contracts relative to lands. The evidence in the case sufficiently establishes that the deed to Quereau, was taken as an absolute conveyance in his own name, without the consent or knowledge of the plaintiff, for she was not present when it was executed, nor was she made aware of, or consulted in regard to its form. The facts make out the existence of one of those resulting trusts good at the common law, which the 53d section of the statute was specially framed to preserve and protect. In respect to the purchase at sheriff's sale under Mott's judgment, the defendant is a purchaser with notice of the equitable estate of the plaintiff, and voluntarily took upon himself all the hazards of that position; and in respect to his own judgment he is a creditor seeking satisfaction out of property to which his debtor had no equitable title. If he is restrained from asserting his claims over the property in controversy he loses nothing, because he parted with nothing upon the faith of it, and in no possible aspect can it be regarded as proceeding immediately or remotely from the creditors of Quereau. The deed and declaration of trust executed by him to the plaintiff of the date of the 16th of June, 1848, vests in the plaintiff such legal title as Quereau then had in the premises, and she is entitled to be relieved from the claim which the defendant makes under his own judgment, as well as that under the sheriff's sale.

Judgment must be entered that the defendant release to the plaintiff his interest in the premises, and that he be enjoined from setting up any claim thereto under the sheriff's sale, or either of the judgments referred to in the plaintiff's complaint, and that the plaintiff recover her costs.

[ORANGE SPECIAL TERM, September 1, 1851. *Brown*, Justice.]

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BIGELOW vs. FINCH.

Where there is a possession at will, or by sufferance, or where possession has been taken under and by virtue of a contract of purchase, it is not such an interest as may be sold upon execution, and either of those facts may be set up as a defense by the defendant in the judgment, when sued in ejectment by the purchaser at the sheriff's sale.

The same defense may also be made by a grantee of the defendant in the judgment, when ejectment is brought against him.

Where, in an action of ejectment, the plaintiff claims to have obtained the interest of the owner, by his purchase of the premises at a sheriff's sale, that fact may be controverted, either by the judgment debtor or any other person, who is at liberty to show that the interest of the judgment debtor was not the subject of a sale upon execution, and thus to invalidate the title on which the plaintiff rests his claim.

The fact that a defendant in an ejectment suit has taken a quit-claim deed from another, and entered into possession under it, will not estop him from questioning the title of his grantor.

An estoppel exists only when there is an obligation, express or implied, that the occupant will at some time, or in some event, surrender the possession; as between landlord and tenant or as between vendor and vendee before conveyance. There is no estoppel as between grantor and grantee.

THIS was an action of ejectment, tried at the Rensselaer circuit in October, 1849, before Justice Wright. The plaintiff claimed to recover by virtue of a title obtained at sheriff's sale under an execution issued on a judgment recovered on the 29th of December, 1841, in the supreme court, in favor of Sylvester Van Valkenburgh, against Morgan Harris and Orry G. Harris. It was proved that the premises in question were bid off by the plaintiff, at such sale, and that at the time of such sale the defendant was in possession of about forty-six acres thereof. The plaintiff then gave in evidence a quit-claim deed from said Orry G. Harris to the defendant, Isaac Finch, dated June 7, 1842, of the premises claimed in the declaration, and proved that Finch went into possession of the premises about the time, or soon after, the execution of the quit-claim deed, and had been in possession ever since. After the plaintiff rested, the defendant offered to show that Orry G. Harris never had or claimed any right or interest in or to the said premises, other than as tenant at will of William P. Van Rensselaer, under a contract for the pur-

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chase of said premises from Van Rensselaer ; that such contract was never performed by Harris, nor was any conveyance executed to him or claimed by him to have been executed to him ; that Harris never had any legal interest in said premises, but the same were owned by Van Rensselaer in fee ; and that on the 3d of May, 1844, Van Rensselaer conveyed the same, for a valuable consideration, to the said defendant Finch, in fee, under which conveyance the defendant had ever since held and claimed the premises. That the defendant purchased and took his conveyance from Van Rensselaer without any knowledge of said judgment. This evidence was objected to by the plaintiff's counsel, and excluded by the judge, on the ground that Finch, by accepting the quit-claim deed from Harris and going into and remaining in possession under said deed, was estopped and concluded from denying or disputing the title of Harris to the premises, and from showing that Harris had no interest therein, liable to be sold on execution ; to which decision the defendant excepted. The other facts are sufficiently stated in the opinion of the court.

The judge directed a verdict for the plaintiff ; to which the defendant's counsel also excepted.

R. W. Peckham, for the plaintiff.

D. L. Seymour, for the defendant.

By the Court, PARKER, J. It was enough, *prima facie*, for the plaintiff to prove a judgment, execution, and purchase by him at the sheriff's sale of the premises in question, the defendant's possession, and that the judgment debtor was in possession at the time of docketing the judgment. Possession, unexplained, is an interest in land that may be sold under a judgment and execution. And, as a general rule, it is no answer for the defendant to say that he has no title. But the statute has made certain exceptions. Estates at will or by sufferance, are not liable to sale on execution. (1 R. S. 722, § 5.) Nor is the interest of a person holding a contract for the purchase of land.

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(1 *R. S.* 744, § 4.) Where the possession is at will, therefore, or by sufferance, or where it has been taken by virtue of and under a contract of purchase, it is not such an interest as may be sold; and the defendant is at liberty to show either of these facts to defeat the plaintiff's recovery. Such defense may be set up by the defendant in the judgment, when sued in ejectment by the purchaser at the sheriff's sale. (*Griffin v. Spencer*, 6 *Hill*, 525. *Colvin v. Baker*, 2 *Barb. S. C. Rep.* 206. *Tooley v. Dibble*, 2 *Hill*, 641, 643.) If, therefore, Orry G. Harris would not have been precluded from insisting on these matters of defense, it can hardly be contended that the defendant Finch occupies a worse condition than his grantor. Harris quit-claimed all his interest in the premises, to Finch. By that conveyance, Finch became the owner of whatever interest Harris had in the premises; but the interest or rights of Harris could not, certainly, be enlarged by any sale or conveyance he might make, and the defendant Finch was at liberty to set up any defense that Harris might have interposed, if he had remained in possession and been made the defendant.

The plaintiff can only recover on the strength of his own title. He claims to have obtained the interest of Harris, by his purchase at the sheriff's sale. This may be controverted either by Harris or any other person, who is at liberty to shew that the interest of Harris was not the subject of a sale by execution, and thus to invalidate the title on which the plaintiff rests his claim. (*Kellogg v. Kellogg*, 6 *Barb.* 116.)

The fact that the defendant had taken a quit-claim deed from Harris, and entered into possession under it, had no bearing upon the admissibility of the evidence offered. Even as between Harris and Finch, the latter would not have been estopped from questioning the title of Harris. (*Osterhout v. Shoemaker*, 3 *Hill* 513, 518. *Sparrow v. Kingman*, 1 *Comst.* 242. *Averill v. Wilson*, 4 *Barb. S. C. Rep.* 180. *Hill v. Hill*, *Id.* 419. *Kenada v. Gardner*, 3 *Id.* 589.) The cases cited show that there is no estoppel as between grantor and grantee. It exists only when there is an obligation, express or implied, that the occupant will at some time, or in some event, surrender the possession; as

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between landlord and tenant, or as between vendor and vendee before conveyance. The defendant was at liberty, if necessary to his defense, to show that Harris had no title, and that he received none by virtue of his quit-claim deed. An estoppel has never been raised on a deed poll, or on a conveyance between grantor and grantee. And the decisions by which it was made applicable, in a claim for dower against a grantee of the husband, have been overruled in the court of appeals, in *Sparrow v. Kingman*.

The defendant ought, therefore, to have been permitted to prove that Harris had no such interest as could be sold on execution, and the judge erred in excluding the evidence.

It is unnecessary to examine the other questions raised by the defendant. They are all of a character to be obviated on another trial.

There must be a new trial; costs to abide the event.

[ALBANY GENERAL TERM, September 1, 1851. *Harris, Parker and Wright, Justices.*]

 WILLIAMS and others vs. JOHNSON.

By an agreement between L. and the plaintiffs, L. agreed to charter to the plaintiffs the canal boat Jeffersonian for the sum of \$500, from the opening of canal navigation in 1847 until its close. L. also agreed to run and man said boat at \$110 per month and 10 cents per mile for towing, night and day, and to pay all other running expenses, tolls excepted. The boat was to be kept in good running order, free of expense to the plaintiffs, and should she be lost, burnt, or otherwise disabled, the charter was to be paid for as *pro rata* for the whole season. In case L. should sell the boat he was to be at liberty to transfer the charter to the new boat he might obtain in exchange. *Held* that the true construction of the agreement was that it did not transfer to the plaintiffs the *ownership* of the boat, during the season of canal navigation: but that L. remained the owner, and therefore might sell the boat; and that upon such a sale being made by him, the right to the freight subsequently earned passed to the purchaser.

Held also, that the purchaser had a lien upon goods of the plaintiffs transported in the boat after its purchase by him, for freight; and that the remedy of the plaintiffs was not by an action of replevin, for such goods, but by an action of covenant against L., upon the charter-party.

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THIS was an action of replevin for the wrongful detention by the defendant of a quantity of corn. The defendant pleaded non-detinet, and a special plea of property in himself, and gave notice that he had a lien, as a common carrier, upon the property in question, for the carriage and transportation thereof. The cause was referred to Amos Dean, Esq. sole referee. On the hearing before the referee it was proven on the part of the plaintiffs that they were forwarders, on the Erie canal. That their business at Buffalo was generally done in the name of A. W. Johnson, and at Albany in the name of H. A. Williams. That Isaac Lincoln owned the canal boat Jeffersonian, and executed to the plaintiffs the following writing, viz. : "Memorandum of an agreement between Isaac N. Lincoln and H. A. Williams & Co. to wit. Said J. N. Lincoln agrees to charter to H. A. Williams & Co. the boat Jeffersonian, now lying in Albany, for the sum of five hundred dollars, payable as follows : \$100 June 1st, \$100 July 1st, \$100 Sept. 1st, \$100 Oct. 1st, \$100 Dec. 1st, and to run and man said boat at one hundred and ten dollars per month, and ten cents per mile for towing night and day. Tolls on boat and horses to be paid by H. A. Williams & Co. All other running expenses are included above. Said boat is to be kept in good running order free of expense to said Williams & Co. ; and should she be lost, burnt, or otherwise disabled, said charter is to be paid for as pro rata for the whole season. Said charter commences on the opening of canal navigation 1847, and continues to its close. In case said Lincoln should sell said boat he has liberty to transfer this charter to the new boat he may obtain in exchange.

Albany, February 27, 1847.

ISAAC N. LINCOLN.

H. A. WILLIAMS & Co.
per Johnson."

Lincoln commenced running for the plaintiffs, under this article, in the early part of May, 1847, and made a trip to Buffalo, and returned with a load for them, which was delivered to Williams. The defendant was on the boat with Lincoln when it went out and when it returned. About the 1st of June, Lincoln went with the boat again, for Buffalo, and the defendant

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was with him. The boat returned about the 15th of June to Albany; the defendant and Lincoln being both on board of her. She brought back 2500 bushels of corn. A shipping bill which was as follows was given in evidence:

"Buffalo, June 10, 1847.

Shipped in good order by William Chard on board canal boat Jeffersonian, — Line, whereof — is master, the following named articles, to be delivered in good order as addressed.

	958 bush. corn			
C. R. Miller.	Lake freight &c. 10½			
coll.	my charges ½	\$105,38		
J. S. Lake & Co.	canal freight 30			
New-York	1550 bush. corn			
& H. Williams	Lake freight &c. 10	155,00		
Albany.	my charges ½	7,75	\$268,18	
	canal freight 30			
	Advanced for tolls, &c.	175		
	Cash for expenses	24	24	
			443,13	
			467,13	
			752,42	
			\$1219,53	

Rec'd my charges of A. W. Johnson. W. CHARD."

This shipping bill was sent by A. W. Johnson, at Buffalo, to H. A. Williams. A portion of this corn was delivered to Williams before this suit was commenced. The defendant then said the residue should not be delivered unless the canal freight was paid. After this refusal the present suit was commenced.

The plaintiffs gave in evidence the following receipt: "Rec'd, Albany, May 31st, 1847, from H. A. Williams & Co., fifty-two $\frac{17}{100}$ dolls. for balance of settlement and charter to June 1.

J. N. LINCOLN."

In June, 1847, the price of freight was nearly double what it was in June, 1846. A demand of the corn was made of the defendant by Williams' book-keeper before suit brought, and he refused to deliver, on account of the canal charges not being

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paid, and said he owned the boat. The plaintiff rested, and the defendant's counsel moved for a nonsuit, on these grounds: 1. That by the shipping bill introduced in evidence, the corn appeared to be consigned to H. A. Williams; and that the action, therefore, should have been brought in his name, and not by the plaintiffs as a firm. 2. That the plaintiffs had not proved themselves to be the owners of the corn, or entitled thereto. 3. That the defendant was proved to be the owner of the boat, and entitled to the freight, and therefore entitled to the property. The referee denied the motion.

On the part of the defendant it was proven that after part of the corn had been delivered to Williams, the defendant asked him if he would pay him for bringing down the corn the price mentioned in the bill. Williams told him he would only pay him according to the charter. The defendant then said he would stop delivering the corn, and did stop. The defendant gave in evidence a bill of sale of the boat Jeffersonian, executed by Isaac N. Lincoln to the defendant, on the 9th day of June, 1847, for the consideration of \$1100; Lincoln covenanting, in the bill of sale, to warrant and defend the sale. One hundred dollars was to be paid by the defendant on the delivery of the bill of sale, and \$1000 in three equal payments, on the 1st of July, August and September, with interest. The shipping bill accompanying the cargo was then given in evidence by the defendant, and was as follows:

"Buffalo, June 10, 1847.

Shipped in good order by William Chard, on board canal boat Jeffersonian, of Albany, — line, whereof — is master, the following named articles, to be delivered in good order as addressed.

H. A. Williams,	2508 bushels corn,	140,448 Inds.
Albany,	Canal freight 30c.	
	Toll advanced,	\$175
	and cash,	24
C. Collect.		

(Signed.) W. CHARD."

The defendant proved by Isaac W. Lincoln, that he executed

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the bill of sale of the Jeffersonian to the defendant, on the day it bore date. That the shipping bill last mentioned was made out by Chard and given by him to the defendant. That the defendant was in the possession of the boat at the time. That the defendant made a bargain with Chard for a load of corn, to be brought to Mr. Vandenburg at 30 cents a bushel. That Chard was a shipper in Buffalo, no way connected with Williams. When the defendant looked at his papers he found that the corn was consigned to Williams. He then refused to bring the freight. Chard told him that Johnson, one of the plaintiffs, and Patten, had requested him to consign it to Williams, as they wanted to contest whether the defendant was owner. The defendant told Chard he had not put on the words "C. Collect," and Chard then put those words into the bill. That he (Lincoln) delivered the boat to the defendant, on the day of the sale, and that the defendant had been in possession of her ever since; and that she was sold some two or three days before she was loaded. That he (Lincoln) had run a boat since, in Bromley's line. That previous to the sale the defendant had been a hired man to him at \$20 per month; that before he sold to him he showed him the article between Lincoln and the plaintiffs; and that the defendant was present when he received the advance from the plaintiffs. That the defendant held two notes against him of \$50, which the defendant gave up to him, and that he did not receive any more of the purchase money until after the plaintiffs replevied the corn. That the defendant gave him a chattel mortgage on the boat, for the purchase money. It was proved that the shipping bill which accompanied the cargo was shown to Williams, and the freight demanded at his office, before the corn was replevied. The corn was worth between 90 cents and \$1 per bushel. The defendant told Williams that he owned the boat; that he bought it of Lincoln, and would not deliver the corn unless Williams paid him the freight. The freight due was shown to be \$605.46.

The testimony closed, and after argument by counsel, in which all the arguments raised in this court were insisted upon before the referee, the referee held that by the true construc-

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tion of the instrument the plaintiffs acquired a right, not to the boat, but only to the use thereof, for the time mentioned in the contract; and that therefore, the defendant was entitled to a report in his favor, on that sole ground. And he reported in favor of the defendant for \$605,46'. The plaintiffs, upon a case, moved to set aside the report.

J. K. Porter, for the plaintiffs.

William Barnes, for the defendant.

By the Court, WATSON, J. The referee in this case placed his decision upon the right ground; for if by the instrument executed between Lincoln and the plaintiffs the ownership of the boat was in the plaintiffs, from the opening to the close of canal navigation, then Lincoln had no right to sell to the defendant, and of consequence the defendant had no claim for freight, against the plaintiffs. The question then is, what is the true construction of that instrument? Did it transfer to the plaintiffs the ownership of the boat, during the season of canal navigation? This may be tested in this way: suppose the plaintiffs and Lincoln had each laid claim to the freight of a voyage where the cargo was consigned to a third person. The case then would be precisely similar to that of *Clarkson v. Edes*, (4 *Cowen's Rep.* 470.) There the words of the charter-party were still stronger than those of the instrument under consideration, though many of the covenants strongly resemble those in this one. The owners, in that case, agreed *to freight and to let to the other party the whole of the schooner Thetis*, for a particular voyage. The owners engaged that the schooner should be tight, strong, well manned, victualed and appareled, and to be kept so during the voyage. The charterers were to pay to the owners at the rate of \$325 per month, at the expiration of each month, together with all port charges; and also to advance moneys as they should be required for the necessary expenses and disbursements of the vessel; and if they should request the commander of the schooner to return to New-York from Havana,

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without going to other ports mentioned in the charter party, the owners covenanted to do so. In that case a contest arose between the owners and the charterers, as to which was entitled to the freight. The court, in giving their decision, say it depends wholly upon who was the *owner* of the schooner during the voyage; the right to collect being *exclusive* in one of the parties. They then give their construction of the contract, and without stating their reasoning upon that subject. I shall content myself with giving the general rule laid down by them, which I consider the well settled rule at this time. "Where the general owner retains the possession, command and navigation of the vessel, and contracts to carry a cargo on freight for the voyage, the charter party is considered a mere affreightment, sounding in covenant; and the freighter is not clothed with the character or legal responsibility of ownership." The court cite in support of this doctrine *Marcadier v. The Chesapeake Insurance Co.* (8 Cranch, 49.) *Hoe v. Groveman*, (1 Id. 237.)

In the case of *McIntyre v. Bowne*, (1 John. 229,) Justice Thompson says that where by the terms of the charter the shipowner appoints the master and mariners, and retains the management and control of the vessel, the charter is rather to be considered as a *covenant to carry goods*. And he held that in such a case the charterer is not the owner. That was a case of barratry, but the decision depended wholly upon the question who was owner of the vessel. In these cases, where the words of the charter-party were somewhat different in each instance, the courts, in putting their construction upon the different contracts, have elaborately examined each clause within them, and all for the purpose of determining from them who was the *owner* of the vessel. And the result of their deliberations has been the establishing of the general rule laid down in the 4th of Cowen's Reports, 481. These cases decide not only that the shipowner, under these circumstances, remains the owner, notwithstanding the charter-party, but that he is entitled to the freight, which he may enforce by lien, or by action. (4 Cowen, 481, and the other cases cited.) If Lincoln remained the owner of the boat, notwithstanding his contract with the plaintiffs, then, were there

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no recognition in that instrument of a right in him to sell, I can see no reason why he could not sell and convey a good title to a third person. True he would be answerable to the plaintiffs, by virtue of his contract with them, for all damages they had sustained, from the time he sold it until the close of navigation, because he had put it out of his power to perform his contract, unless he transferred the charter to another vessel which he had obtained. For I hold, with the referee, that there is no limitation in that contract as to the time of his selling the boat. But that contract expressly recognizes the right of Lincoln to sell, and that, too, without any conditions. If so, then a sale by him is good. The position taken by the plaintiffs' counsel, that if Lincoln sold the boat the vendee would have to take her subject to the contract made with the plaintiffs, can not be well founded; for that depends entirely upon the ownership of the boat. If the plaintiffs were the owners *pro hac vice*, for the season of canal navigation, then a sale of her, by Lincoln, would be subject to such a condition; not being the absolute owners, but only having a contract with Lincoln by which he covenanted to carry goods for them, if he failed to perform it their remedy was on the contract. Nor can the allegation of the plaintiffs' counsel, that Lincoln and the defendant conspired together to defraud the plaintiffs out of the profits of their contract, by the sale of the boat to the defendant, if true, alter the case in any respect. If by this allegation the plaintiffs mean that the boat, as well as all that she carried, still belonged to Lincoln, and that the sale was a sham, then the finding of the referee is conclusive against them; for this point was raised before him. It is true the case states that the referee held that by the true construction of the instrument, the plaintiffs acquired a right, not to the boat, but only to the use thereof for the time mentioned in the contract, and that, therefore, the defendant was entitled to a report in his favor, and that this was the sole ground for his report. But this covers the whole ground; for it finds that Lincoln was the owner of the boat, as against the plaintiffs, with a right to sell. And he having, without fraud, sold it to the defendant, the defendant was entitled to recover for the

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freight. The report of the referee, which was before us on the argument, goes more into detail, and notices more minutely all the positions taken by the plaintiffs' counsel, before him; and though he does not notice the fraud alledged as in any way affecting the rights of the parties, I take it for granted that so able and shrewd a lawyer did not omit it by mistake, and that he either came to the conclusion that there was no fraud, or that if Lincoln designed by this sale not to perform his contract, the only remedy of the plaintiffs was on the instrument. Suppose Lincoln had locked up the boat, discharged the hands, and refused to run her any longer, when the season of navigation was not half ended, would the plaintiffs be in any different situation than they would be if he sold the boat to another person, and put it out of his power to perform? They would have no right to seize the boat, man her, and run her for the remainder of the season. That right remained in Lincoln according to the contract. Although in this case I have no doubt Lincoln, finding that freights were higher than when he made the contract, determined not to perform it, and therefore sold out, and in consequence of his so doing the plaintiffs lost the profits they might otherwise have derived from the contract, unless Lincoln is able to respond in damages; still, the case is one of every day occurrence, where the party making a contract does not sufficiently guard against contingencies of this kind, and must therefore abide by the consequences. The referee, after a careful examination, came to a conclusion in favor of the defendant, and I am satisfied that the case was decided upon a sound and salutary principle, though it may in some instances work injustice. Unless the owner of the vessel, or the master who sails her, and who represents the owner, should *alone* be entitled to recover for the freight, how numerous would be the contests as to who were entitled to it, and who would be safe in paying such freight; unless these open, notorious acts, those of commanding and having possession of the ship, should characterize them as the owner, so far as their right to recover for freight is concerned.

The motion to set aside the report must be denied.

[ALBANY GENERAL TERM, Sept. 1, 1851. Harris, Watson and Wright, Justices.]

MORSS vs. MORSS.

One of three referees, before whom a cause is tried, can not be sworn and examined as a witness on the trial.

THIS was a motion to set aside a report of referees, on the ground that on the trial, one of the referees was sworn and examined as a witness by one of the parties, the other party objecting.

By the Court, PARKER, J. On the trial of this cause before the referees appointed by this court, the plaintiff's counsel called as a witness, Mr. F. A. Fenn, one of the referees. He was objected to on the part of the defendant, on the ground that being a referee, he was incompetent as a witness. The objection was overruled, and the witness sworn and examined.

Inasmuch as no adjudged case can be found determining the question, it is important that we examine and decide whether, on a reference before three referees, one of them is a competent witness.

Referees act in the place both of judge and jury. They are to decide all questions, as well of law as of fact, that arise on the trial. All the referees must meet together and hear all the proofs and allegations of the parties; but a report by any two of them is valid. (2 R. S. 481, 3d ed.) The statute also provides, in the same section, that "any one of the referees may administer the necessary oath to the witnesses produced before them for examination." Though the oath is in form administered by one of the referees, it is in truth the act of all, and it can only be done by the authority and in the presence of all of them. In this respect one acts as clerk of the board, just as the clerk of a court of record administers an oath at the circuit, by the authority and in the presence of the court. The former is the act of the board of referees, and the latter of the court. The former would be invalid in the absence of the other referees, as the latter would be in the absence of the judge.

It is singular that so little is to be found in the books on the subject of the admissibility as a witness, of a judge or a juror,

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engaged in the trial of a cause. I have known one of a legal tribunal necessarily consisting of three persons, sworn as a witness by consent of parties; and I have several times seen a juror examined as a witness; but I have never known either to be done under objection. The competency of a judge rests upon different grounds from that of a juror.

A juror is to decide only questions of fact, and is examined before the cause is submitted to him. The objection to his competency rests on public policy. In all cases he has to pass upon his own credibility; and this difficulty would be greatly increased in case of his impeachment. He may refuse to answer, in which case his commitment would delay the trial. The party against whom he is called is subjected to a great disadvantage, for the juror may be expected to maintain unyieldingly in the jury box, the opinions he has expressed on the witness' stand. It may plausibly be objected, therefore, that respect for the feelings of the juror, and regard for justice to the parties should exclude the juror as a witness, and require the objection to be made on the calling of the jury, that the party need not suffer for the want of his testimony. It has, however, been supposed that a juror may be sworn as a witness. (1 *Stark. Ev.* 449. *Greenl. Ev.* § 364, note.) And so it was intimated at nisi prius in *Rex v. Roper*, (7 C. & P. 648,) and in *Manly v. Shaw*, (1 *Cur. & Marsh.* 361.) A recent English writer on the principles of evidence, (*Best on Ev.* § 169,) expresses the opinion that it is now fully settled that a juryman may be a witness for either of the parties to a cause which he is trying, and cites additional authorities in favor of the proposition.

But the objection to the competency of a judge as a witness rests on an entirely different ground. It goes to the power of the court—the power to administer the oath, to decide on a question of competency, or the admissibility of parts of the evidence, to commit for refusing to answer, and to exercise over the witness all the other powers of the court, which may be called into requisition for the protection of the rights of the party. The only adjudged case I have found on this subject, is that of *Ross v. Buhler*, (2 *Martin's Lou. R. N. S.* 812.) There the defendants

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having need of the testimony of the district judge, prayed him to give it, but it was excluded, and the defendant excepted. On appeal, the court sustained the decision of the district judge. This decision was in accordance with the civil law. (*Lisle & Carleton*, 200,) where in Partid. 3, tit. 16, l. 19, it is laid down, "And we moreover say that a judge can not be a witness in a suit which he has already decided, or which he has to decide; but he may give evidence as to what passed before him as a judge when thereto required by the king, or the supreme judges, who have cognizance of the appeal."

Such was also the law of Scotland. In Stairs' Inst. Book 4, tit. 2, sec. 33, it is said: "The knowledge which the judge himself may have of the truth of the fact, makes no proof, for he can not be both judge and witness in the same cause, and he must give his sentence, *secundum allegata et probata*. But his knowledge of the notoriety is sufficient, unless it be overruled by pregnant contrary evidence." It is stated in Ersk. Inst. Book 4, tit. 2, sec. 33, as follows: "But the particular knowledge of the judge is not probative; for the judge must proceed *secundum allegata et probata*, and can not be both judge and witness in the same cause, upon particular knowledge; and yet his knowledge of the notoriety is sufficient, but so that the notoriety may be regarded by a stronger positive probation, if it be in due time prepared and proved;" and again, "Albeit, judges can not be both judges and witnesses, not only in the same point but even in the same cause, (which is introduced that the power of judges be not too much increased,) yet it reaches not to notoriety; or to what is done in presence of the judge in judgment, as what he sees and hears; for these are counted as *notour*." But at a later day it was denied that even notoriety within the knowledge of the judge was evidence before him, (*Glassford on Ev.* 602,) where it is said, "But notoriety to the court, unless it is a matter having recently happened in their own presence, is not sufficient, for the same person may not be judge and witness also." And this is approved by a later writer, (*Tait on Ev.* 432,) who says "Lord Stair, and after him Mr. Erskine, seem to consider the judge's knowledge of the

notoriety admissible proof of that fact; but Mr. Glassford lays down an opposite doctrine, upon the general principle that a judge can not act as a witness, and it rather appears that his opinion is correct."

All these writers agree that "the particular knowledge of a judge is not probative," for the reason that he can not be both judge and witness; and it is not material to the question we are examining, whether he can avail himself of his knowledge of notoriety, though the latter opinions exclude that also. (*Cowen's Tr.* 662. *Hopkins v. Cabrey*, 24 *Wend.* 264.) So generally does this rule seem to have been acquiesced in, that Prof. Greenleaf says, (*Green. Ev.* § 364,) "It seems now to be agreed, that the same person can not be both witness and judge in a cause which is on trial before him. If he is the sole judge, he can not be sworn; and if he sits with others, he still can hardly be deemed capable of impartially deciding on the admissibility of his own testimony, or of weighing it against that of another." (*See also Cowen & Hill's Notes to Phil. Ev.* 60; *Best on Ev.* 170; *Taylor's Ev.* § 1011.)

In England it is said to be no objection to the competency of a witness, that he is named as a judge in the commission under which the court is sitting. (*Best on Ev.* § 170. 2 *Hawk. P. C. ch.* 46, § 17. *Rex v. Hacker*, *Kely.* 12. 11 *How. St. Tr.* 459.) But Best says a distinction has been taken with respect to the judge who is actually trying the cause. (*Citing Green. Ev.* § 364. *Taylor's Ev.* § 1011.) In Sir John Kelying's Reports, 12, we are told that on the trial of the Regicides in 1660, Secretary Morris and Mr. Amesly, president of the council, were both in commission for the trial of the prisoners, and sat upon the bench; but there being occasion to make use of their testimony against Hacker, one of the prisoners, they both came off the bench, and were sworn and gave evidence, but it is further stated that "they did not go up to the bench again during that man's trial;" and this shows that there was a legally constituted tribunal without them, and therefore the case has no applicability to the question under examination. So too it is the practice of the English house of lords, on the trial of a no-

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bleman, that any one of the peers may be sworn as a witness. (*Ld. Staff. case*, 7 *How. St. Tr.* 1384, 1458, 1552. *Earl of Macclesfield's case*, 16 *Id.* 1252, 1391.) But in that case also there was the requisite number of peers sitting at the same time to constitute the court, exclusive of the peer under examination as a witness. The question of the power of the court was not raised. If two referees were competent to act without the presence of a third, the cases would be parallel.

In cases of trial before justices of the peace, the statute (2 *R. S.* 342, 3d *ed.*) has provided, that in case the defendant, before the joining of issue, shall make an affidavit showing that the justice is a material witness for him, without whose testimony he can not proceed to trial, the justice shall discontinue the cause without costs to either party. This statutory provision would not have been necessary, if there had been power to take the testimony of the justice before himself. Such a provision was necessary in regard to a justice's court, to protect the rights of the defendant; but not in regard to courts of record, where the defendant can always have relief by putting off the cause at the circuit, on an affidavit setting forth the facts. An affidavit showing that the judge was a material witness, would be sufficient to authorize the judge to decline trying the cause, and to leave it to be tried when some other judge should hold the circuit. A similar statutory provision was unnecessary in regard to referees, because the party can always make the objection at the time of their selection, and thus see that no one is appointed who may be needed as a witness. In *Perry v. Weyman*, (1 *John.* 520,) a judgment rendered in a justice's court was reversed because the justice who held the court was himself sworn as a witness by another justice, who attended for that purpose. (*Cowen's Tr.* 879.)

In examining this question upon principle, there seems to be the same difficulty, whether the court consists of one judge or of three, all of them being necessary to constitute the court. In the latter case, if one of the judges be called as a witness, there are but two judges left to administer the oath, to decide upon his competency if he be objected to, and to decide ques-

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tions as to the relevancy of his testimony. If he refuses to answer, there are but two judges to commit him for contempt. Two-thirds of a court can not form a legal tribunal. The party has a right to three judges, the number prescribed by statute. Can it be said that there are three judges when one is under examination as a witness—or in the prisoner's box, on a proceeding for contempt in not answering? When thus proceeded against he becomes a party, and may be heard in his defense either in person or by counsel. Can it be said, that under such circumstances, he still, by his presence, forms part of the court, and gives validity and jurisdiction to its proceedings? And is it not absurd to say that he still forms part of the court, when the two judges still on the bench commit him for contempt? The statute has declared the qualifications of judges, and will not allow one to sit in any cause to which he is a party, or in which he is interested. (2 R. S. 378, 8d ed.) If one judge, holding a court alone, can not be both judge and witness, it seems to me to be equally clear upon principle, that a judge can not, who is one of three judges necessary to constitute a court. The two characters are inconsistent with each other, and their being united in one person is incompatible with the fair and safe administration of justice.

I have shown that the objection to a juror's being a witness, rests mainly on a question of public policy, and that the objection to a judge being sworn depends on an additional and different ground, viz. that of want of power to discharge the duties of a court while acting as a witness. But these objections combined apply in full force to the case of a referee who is to discharge the duties of both judge and jury. He decides both the law and the fact. The referees must have full power to decide upon the competency of every witness and the relevancy of every question; and where a cause is referred to three referees, that full number must be present, free from all bias, and competent to decide every question of law presented. And public policy strongly demands, as in the case of a juror, that they should be equally indifferent and unbiased as to all the evidence, and every question of fact before them for decision.

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I think the referees erred in allowing one of their board to be examined as a witness, and that the report should, therefore, be set aside.

Report of referees set aside and a new trial ordered.

[ALBANY GENERAL TERM, September 1, 1851. *Harris, Watson and Wright*, Justices.]

McKENZIE and others vs. L'AMOUREUX and others.

An action may be brought by one or more of several legatees, in behalf of themselves and the others, against the personal representative of the testator, and the residuary legatees and devisees, for an account of the personal estate and of the debts, legacies, &c. and to have the real estate sold and the proceeds, together with the personal estate, applied in payment of the debts and legacies. And all the legatees may avail themselves of the decree. This rule has not been changed by the code of procedure.

When the question involved is one of "*common or general interest*," the action may be brought by one or more, for the benefit of all who have such common or general interest, without showing that the parties are very numerous, or that it would be impracticable to bring them all before the court. The provision of the code, declaring that when the parties are very numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole, applies indiscriminately to all actions, whether they involve questions of common interest or not.

DEMURRER. The plaintiffs stated in their complaint, that the action was brought as well on their own account as on account of the other legatees of Mary McKay, deceased. They then set forth the will, from which it appeared that they, together with Margaret Heinzelman, Eliza McIntosh and Mary, wife of John Norton, were entitled to legacies, and that the estate of the testatrix, real and personal, chargeable, as they alledged, with the payment of those legacies, was given and devised to Elizabeth, Caroline, Jane and Hallowell Matilda, daughters of the late Lachlane Stewart. These three residuary legatees and devisees, together with James L'Amoureux, administrator of the estate with the will annexed, were defendants in the suit. It was alledged that the personal estate was insufficient to pay the

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legacies. The plaintiffs demanded judgment that the will be established, that an account might be taken of the personal estate, and also of the debts, legacies, and funeral expenses of the testatrix; that the real estate might be sold, and that the proceeds, together with the personal estate, might be applied in due course of administration in payment of the debts and legacies. To this complaint the defendants, who were residuary legatees, demurred, stating several grounds of demurrer, and among others that there was a defect of parties, plaintiff or defendant, in not making Margaret Heinzelman, Eliza McIntosh and Mary Norton, three of the legatees named in the will, and interested in the matters sought to be brought in question, and involved in this action, parties, either plaintiffs or defendants, and also that the joinder of more than one, and less than the whole of such legatees was either a defective or improper joinder of plaintiffs in this action.

The cause having been argued before Mr. Justice Wright, upon the issue of law so joined, and the demurrer having been sustained, the plaintiff appealed from the decision.

J. Edwards, for the plaintiffs.

A. Taber, for the defendants.

By the Court, HARRIS J. The learned judge who decided this cause at the special term, admitted that as the practice existed at the time of the adoption of the code, this action might properly have been brought by the plaintiffs on behalf of themselves and the other legatees who were not made parties. The authorities to which he has referred, show that one legatee might sue on behalf of himself and all the rest, and that all might avail themselves of the benefit of the decree. (*Brown v. Rickets*, 3 *John. Ch.* 553. *Thompson v. Brown*, 4 *Id.* 619. *See also Ross v. Crary*, 1 *Paige*, 416. *Hallett v. Hallett*, 2 *Id.* 15. *Cooper's Eq. Pl.* 39, 40.) But he came to the conclusion that this rule had been changed by the code, and that now all persons who are necessary parties to a complete

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determination of the questions involved in the action, must be brought before the court either as plaintiffs or defendants. Upon this ground the demurrer was sustained.

In this conclusion I can not concur. So far was the legislature from intending any change in the rule on this subject, that in making the great changes contemplated by the adoption of the code, it was careful to preserve this convenient practice of the court of chancery. The code commissioners had reported a section, copied substantially from one of the rules of the supreme court of the United States, providing that those who are *united in interest* must be joined as plaintiffs or defendants, except that, if the consent of any one who should have been joined as plaintiff, can not be obtained, he may be made a defendant, the reason thereof being stated in the complaint. This too was the practice in the court of chancery. The legislature adopted the provision thus reported, but added to the section as follows: "And when the question is one of a common or general interest of many persons; or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole." (*Code*, § 119.) This was also in accordance with the then existing practice of courts of equity. The legislature seems to have apprehended that, by adopting the rule reported by the commissioners, it might be understood to have rejected the kindred rules embraced in the latter clause of the section. To prevent this misapprehension the latter clause was added, thus retaining in the new practice the same rules by which to determine whether the proper parties were before the court, which then prevailed in the court of chancery.

The section in question requires that, except in a specified case, all who are *united in interest* shall be joined as parties; and then declares that when the action involves a question of *common or general interest* to several parties, or when, though united in interest, the parties are very numerous and it is impracticable to bring them all before the court, then one or more may sue or defend for all. This I understand to be the clear and obvious import of the section. The distinction between

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parties who are "*united in interest*" and those who have "a common or general interest" in the question, is aptly illustrated in this very case. By the will the testatrix gave to the children of her deceased sister Jane Ferguson a legacy of \$400. The plaintiffs, James Ferguson, Elizabeth Ferguson and George Ferguson are those children. They are jointly, not severally, entitled to the legacy. Like three partners, suing for a debt due to them as partners, they are "*united in interest*," and must be joined as parties. But the plaintiffs, Isabella McKenzie and Barbara McKenzie are each entitled to a separate legacy. They have a *common interest* in establishing the will and having a fund provided for the payment of the legacies, but they are not united in interest with each other or the other legatees. So also in the case of the three legatees who are not made parties.

The error into which my learned associate has fallen arises from his failure accurately to distinguish between the two classes of cases in which it is allowable for one or more parties to sue for the benefit of others as well as themselves. He has evidently understood the statute to allow a suit to be brought in this form, when the question is one of common or general interest, and where, in such a case, the parties are very numerous and it is impracticable to bring them all before the court. Accordingly he says, "this is not a case in which the parties are very numerous," nor would it be "impracticable to bring them all before the court." "There are but three persons whose interest in the subject matter of the action is identical with the plaintiffs. These are not joined as plaintiffs, nor is there any reason assigned why they are not." I have already shown, I think, that when the question involved is one of "*common or general interest*," the action may be brought by one or more for the benefit of all who have such common or general interest, without showing that the parties are very numerous, or that it would be impracticable to bring them all before the court. This latter provision applies indiscriminately to all actions, whether they involve questions of common interest or not.

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I think the judgment should be reversed, and that the plaintiffs should have judgment upon the demurrer, with liberty to the defendants to answer upon payment of costs.

[ALBANY GENERAL TERM, September 1, 1851. *Harris, Watson and Wright, Justices.*

11b 520
37ap 25

 VAN KIRK vs. WILDS.

Upon an application to a justice of the peace, for an *attachment* against the defendant, there must be an affidavit, proving the grounds on which the application is founded, in all cases, not excepting that of a non-resident.

If an affidavit states that the plaintiff has a debt against the defendant, to a specified amount, arising upon contract, and that the defendant is a non-resident of the county, it is enough to warrant the justice in issuing an attachment.

Where a constable returns, upon an attachment, that he has delivered to each of the defendants, personally, a copy of the attachment and inventory, this is *prima facie* sufficient, although he does not state that the copies served were *certified* by him.

Some things may be presumed, in favor of a proper discharge of duty by a public officer. When he returns that he has made personal service of process he is not required to state what in particular he did, to constitute such service. It will be presumed that he did all that the law requires.

In such cases it must be made affirmatively to appear that the requirements of law have not been complied with, before advantage can be taken of a defect in the mode of service.

When an officer on being sued for taking property, by virtue of an attachment, alleges and seeks to prove that an alleged transfer of the property to the plaintiff by the defendants in the attachment suit was fraudulent as against creditors, he will be permitted—for the purpose of giving character to the transaction, and enabling the jury to determine as to the motives which actuated the parties—to prove other transactions in which the parties were engaged about the same time.

A general exception to the charge of a judge is of no avail, unless the entire charge is erroneous.

Form and validity of attachments issued by justices of the peace.

MOTION for new trial. The action was trespass, for taking &c. four mules and the harness for the same, one wagon, four halters,

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one pair of bark sleds, two bags and six bushels of feed. It was tried before Mr. Justice Watson, at the Ulster circuit, in December, 1848. Upon the trial, the plaintiff proved that the defendant, who was a constable of the town of Wawarsing, took the property on the 11th of February, 1848, out of the possession of his agent, and afterwards sold it. The defendant, to justify the taking, offered in evidence three attachments with his returns indorsed thereon, of which attachments and returns the following are copies: "Town of Wawarsing, Ulster county, ss. To any constable of said county, greeting. Whereas William Cortelyou has applied for an attachment against the property of Richard C. and Job Van Kirk, *against whom he has a claim for one hundred dollars*, and produced satisfactory proof that the said Richard C. and Job Van Kirk *are making disposition of the property with intent to defraud their creditors*, therefore the people of the state of New-York command you to attach so much of the goods and chattels of the said Richard C. and Job Van Kirk as will be sufficient to satisfy the said claim, and safely to keep the same to satisfy any judgment that may be rendered on this attachment, and that you make return of your proceedings thereon to me on the 14th day of February instant, at nine o'clock in the forenoon, at my office in Ellenville, in the said town. Dated February 11, 1848. Charles Hartshorn, justice of the peace." (Indorsed) "By virtue of the within attachment I did, on the 11th day of February, 1848, at 10 o'clock in the forenoon, attach the following property and serve personally, viz. on four mules and four halters, and gave each of the within named defendants a copy of the within, and an inventory of the property attached indorsed thereon. Fees \$1,50. S. Wilds, const."

"Town of Wawarsing, Ulster county, ss. To any constable of said county, greeting. Whereas Robert H. McCartee by agent has applied for an attachment against the property of Richard C. and Job Van Kirk, *against whom he has a claim for about forty dollars*, and produced satisfactory proof that the said Richard C. and Job Van Kirk, as also the said plaintiff, *are non-residents of Ulster county, with intent to defraud*

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his creditors, therefore," &c. The residue of the attachment and the return thereon were the same as the first mentioned.

"Town of Wawarsing, Ulster county, ss. To any constable of said county, greeting. Whereas Andrew Shiner has applied for an attachment against the property of Richard C. and Job Van Kirk, against whom he has a claim for twenty-one dollars and thirty cents, and produced satisfactory proof that the said Richard C. and Job Van Kirk have *run away from New-Jersey with property with them with intent to defraud his creditors, therefore," &c.* The residue of the attachment and the return thereon were the same as the first mentioned.

To support the attachment in favor of *Cortelyou*, the defendant gave in evidence an application signed by him as follows: "To Charles Hartshorn, one of the justices of the peace of the town of Wawarsing in the county of Ulster. I, William Cortelyou, hereby make application to you, according to the provisions of article second, title fourth, chapter second, part third, of the revised statutes, to issue an attachment in my favor against the property of Richard C. and Job Van Kirk, *non-residents*. Dated February 11, 1848."

Also an affidavit as follows: "Ulster county, ss. William Cortelyou being duly sworn, says, that Richard C. and Job Van Kirk are justly indebted to him, in a demand arising upon contract, in the sum of one hundred dollars, over and above all discounts which the said Richard C. and Job Van Kirk have against him, and that the application for an attachment against the property of the said — which accompanies this affidavit, is made on the ground that William Cortelyou, *as also the said Richard C. and Job Van Kirk are non-residents of Ulster county*, and that the said Richard C. and Job Van Kirk have escaped from New-Jersey, and are now said to be in this county, and have, as above stated, left New-Jersey with intent to defraud creditors." Signed, W. Cortelyou. Subscribed and sworn before me this 11th day of February, 1848. Ch. Hartshorn, J. P.

The application was also accompanied by a bond, to the form or sufficiency of which no objection was made.

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The application for an attachment, and the affidavit and bond in each of the other cases, were substantially the same as in the case of Cortelyou.

The counsel for the plaintiff objected to the attachments, on the ground that the affidavits and papers on which they were issued were insufficient. The court decided that no affidavits were necessary, as the parties were non-residents of the state. The counsel for the plaintiff also objected to the attachments, 1. That, on their face, they did not purport to have been issued by virtue of the non-imprisonment act authorizing the issuing of short attachments against non-resident defendants without affidavit; that they were not in conformity to the requirements of that act, and were not sufficient on their face to protect the officer. 2. That they did not purport to be issued on a demand arising upon *contract*. 3. That the return of the officer did not show that the constable served a copy of the attachment and inventory of the property attached, *certified by him*. All these objections were overruled, and the counsel for the plaintiff excepted.

The defendant then offered to show that after the property had been seized by virtue of the attachment, and on the same day, a judgment had been entered by confession against Job Van Kirk, in favor of Peter Van Kirk, and another against Richard C. Van Kirk in favor of William J. Prout, his brother-in-law, upon which executions were issued by consent, placed in the hands of the defendant, and by him levied upon the same property. This evidence was objected to, on the ground that executions subsequently issued could not justify the original taking. The objection was overruled, and the plaintiff's counsel excepted.

Evidence was then offered, on the one hand, to show that the sale of the property by Richard C. and Job Van Kirk to the plaintiff, was fraudulent and void as against creditors, and on the other hand, to sustain the validity of the sale. This question was submitted to the jury upon the evidence, and they found a verdict in favor of the defendant. Some other questions arising upon the trial, or discussed upon the argument, are noticed

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in the opinion of the court. The plaintiff, upon a case, moved for a new trial.

E. Cooke, for the plaintiff.

J. O. Linderman, for the defendant.

By the Court, HARRIS, J. The attachments by virtue of which the defendant justifies the taking of the property, are sought to be sustained under the 33d section of the act to abolish imprisonment for debt, which authorizes a defendant, not liable to arrest, to be proceeded against by summons or attachment, when not a resident of the county. Previous to the decision in *Taylor v. Heath*, (4 Denio, 592,) it had been supposed that such an attachment might be issued without any affidavit. The learned judge so held, upon the trial of this cause, and his decision is sustained by authority. (*Clark v. Luce*, 15 Wend. 479. *Bates v. Relyea*, 23 Id. 336. *Van Etten v. Hurst*, 6 Hill, 311.) But in *Taylor v. Heath*, Mr. Justice Beardsley, after a very diligent examination of the statute, came to the conclusion that the requirement of the revised statutes, that the applicant for an attachment, or his agent, shall make an affidavit, proving the grounds on which the application is founded, is not repealed either expressly or by implication, by the act to abolish imprisonment for debt, and that before an attachment can issue, even against a non-resident, under the 33d section of the last mentioned act, an affidavit is necessary. His associates concurred with Judge Beardsley so far as to hold that before an attachment can be issued against a non-resident, the justice must have evidence that he is in fact a non-resident; so that now it may be regarded as settled, practically at least, that in all cases, not excepting that of a non-resident, there must be an affidavit.

But while the judge was wrong in holding that no affidavit was necessary, I think he did not err in receiving the evidence. The affidavits upon which the attachments were granted, as well as all the other proceedings before the justice, are exceedingly

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informal; but I think they contain enough to meet the requirements of the statute. Among other things, quite unnecessary, they do state that the plaintiff in the proceeding has a debt against the defendants to a specified amount, arising upon contract, and that the defendants are non-residents of the county. This, I think, was enough to warrant the justice in issuing the attachments. These, though they omit some recitals usually found in such process, and contain others which ought not to be there, are, I think, sufficient to justify the defendant in taking the property.

Nor do I think the objection to the constable's return was well taken. The statute requires that upon the seizure of the property, the officer shall immediately make an inventory, and if he can be found in the county, serve a copy of the attachment and inventory, *certified by him*, upon the defendant personally. Here the constable returns that he delivered to each of the defendants, personally, a copy of the attachment and inventory. Such a return is, I think, *prima facie*, sufficient, without stating that the copies served were certified by the officer. Some things may be presumed in favor of a proper discharge of duty by a public officer. When he returns that he has made personal service of process, he is not required to state what particularly he did to constitute such service. It will be presumed that he did all that the law requires. If it was that he should read the process to the defendant, it may be presumed that he read it. If the law required that he should deliver a copy, it may be presumed that the copy was delivered; and when it is required that the copy delivered shall be *certified by him*, it may be presumed that it was so done. In such cases it must be made affirmatively to appear, that the requirements of law have not been complied with, before advantage can be taken of a defect in the mode of service. All that can be said in this case is, that it does not affirmatively appear whether the copy of the attachment and inventory delivered to the defendants, severally, was certified by the constable to be a copy or not. It may have been so certified, and it may not. Under these circumstances, as the copies were personally delivered, and no objection was

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taken to the mode of service by the defendants, it is to be presumed that the officer served them in the manner prescribed by law.

If, as the plaintiff's counsel seems to have supposed, the evidence of the confession of the judgments by Richard C. and Job Van Kirk, on the day the attachments were issued, had been offered for the purpose of justifying the taking of the property by the defendant, I should be inclined to think the objection to the evidence well taken. But I think the evidence was admissible upon another ground. The defendant alledged, and sought to prove, that the transfer of the property in question by Richard C. and Job Van Kirk to their brother, the plaintiff, was fraudulent as against creditors. For the purpose of giving character to the transaction, and enabling the jury to determine the motives which actuated the parties, it is allowable in such cases to prove other transactions in which the parties were engaged about the same time. Thus, when the vendor of goods seeks to avoid the sale on account of the alledged fraud of the vendee, it is competent to prove other frauds practiced upon other persons by the same vendee, about the same time. For the same reason I think it was competent to prove the confession of these judgments, and also the conveyance executed by Richard C. Van Kirk to the plaintiff.

It appears by the returns of the defendant, that he only seized four mules and halters upon the attachments, and the plaintiff now claims that he was entitled to recover for the value of the residue of the property. The omission to include the wagon and harness and the bags and feed in the return, was undoubtedly a mere inadvertence—one, too, which seems to have escaped the notice of the plaintiff himself upon the trial. It is evident that the trial proceeded throughout, upon the assumption that all the property had been taken under the attachments and sold to satisfy the demands of the plaintiffs in the attachments. There can be no doubt that this was in fact the case, and it is now too late to raise the objection for the first time, that the return of the officer does not embrace all the property attached.

The only other point made by the plaintiff is, that the court

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erred in charging the jury. This may be so, though I have not perceived the error, nor has the plaintiff's counsel undertaken to point it out. The plaintiff's counsel has only taken a general exception to the charge of the judge. Such an exception is of no avail, unless the entire charge is erroneous. That is not pretended in this case. I am of opinion, therefore, that the motion for a new trial should be denied.

[ALBANY GENERAL TERM, September 1, 1851. *Harris, Watson and Wright, Justices.*]

RIDGELEY vs. JOHNSON and others.

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The power of trustees, over the subject matter of the trust, is equal and undivided. They can not, like executors, act separately; all must join, both in receipts and conveyances.

A deed in the names of, and purporting to be executed by, three trustees of a trust in lands, appeared, upon its production, to have been in fact executed by only two of the trustees. The trustee who did not execute the deed had been appointed only a few months previous to the date of the deed. *Held* that inasmuch as the deed, upon its face assumed that he was still alive, and he was named as one of the grantors therein, the presumption was that he was alive at the date of the deed, and that a party claiming under the deed, in order to avail herself thereof, by showing authority in two trustees only to execute it, was bound to prove that such third trustee was dead at the time the deed was executed by the others.

A memorandum, found on the flyleaf of the book of records of a town, which speaks of the wife of H. as his *widow*, and refers to an examination in respect to trust property of the town, which had been in the hands of H. as a trustee, made by his co-trustees, which memorandum forms no part of the record properly made by any person whose duty it was to make entries in the book; and with nothing to show by whom, or under what circumstances, it was made, is no evidence of the death of H.

A memorandum, indorsed by the surveyor, upon the field book of a survey, is not admissible evidence to prove the death of a person; it being nothing more than the written declaration of a third person, in respect to a matter with which he had nothing to do.

In every instance in which an entry or memorandum made by a third person has been received in evidence against others, it has been where the entry or

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memorandum related to some act performed by the party making it, in the discharge of his duty, and in the usual course of his business.

The mere existence of a deed for more than thirty years, without any proof of accompanying possession, is not enough in any case to authorize it to be read in evidence as an ancient deed, without proof of its execution.

THIS was an action to recover damages for unlawfully entering upon the plaintiff's land and cutting and carrying away timber. It was tried at the Sullivan circuit, in September, 1850, before Mr. Justice Watson.

The complaint stated that the plaintiff being the owner and in possession of subdivision lot No. 47, in the middle allotment of great lot No. 4, of the Hardenburgh patent, in the town of Neversink, the defendants, on the 10th day of June, 1849, entered &c. The defendants denied that the lands were situated in or belonged to, or formed any part of the Hardenburgh patent, and averred that they were situated in, and formed a part of the Rochester patent; and that at the time when &c., they were owned by, and in the possession of one Neal Benson, under whom &c. Upon these allegations in the answer issue was joined.

Upon the trial the plaintiff gave in evidence the Rochester patent, bearing date the 25th day of June, 1703, whereby there was granted to Colonel Henry Beekman, Captain Joachim Schoonmaker and Moses De Puy, their heirs and assigns forever, "all that tract or parcel of land, lying and being in the county of Ulster and beginning at the south bounds of the lands now in the possession of John Van Camps: from thence running with a southeast line to the land of Captain John Evens, and so along the north bounds of the said Captain John Evens, his land, till you come against the sand hills: from thence with a northwest line to the great mountains, commonly called the *blue hills*. Thence *northeast something northerly along the said hills to the bounds of Marbletown*; and from thence along the bounds of Marbletown to the place where first began." To have and to hold &c., "*in trust*, nevertheless, for themselves and all the freeholders and inhabitants for the time being of Rochester aforesaid, formerly called Mombachus: to be by them, the said Henry Beekman, Joachim Schoonmaker and Moses

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Du Puy, the survivor or survivors of them, managed, used, ordered, let, sold or disposed of in part or in the whole, for the good benefit and advantage of the said freeholders and inhabitants, from time to time, in such manner and sort, and in such parts and proportions, as by them the said Henry Beekman, Joachim Schoonmaker and Moses De Puy, the survivor or survivors of them, by and with the advice of two of the principal freeholders and inhabitants aforesaid shall be thought fit and convenient." And upon the further trust to convey all of the lands, not otherwise sold and disposed of by them, "unto three such other persons, their heirs and assigns, in fee simple, as shall be elected and chosen trustees of the said lands and premises by a majority of the voices of the freeholders and inhabitants of Rochester aforesaid, formerly called Mombachus, upon the first Tuesday of June next, which will be in the year of our Lord 1704, upon the like trusts and confidences as the same lands and premises are hereinbefore mentioned to be granted to them the said Henry Beekman, Joachim Schoonmaker and Moses De Puy, their heirs and assigns as aforesaid. And we hereby declare our royal will and pleasure to be, and do further order and appoint that the said freeholders and inhabitants of Rochester aforesaid, formerly called Mombachus, for the time being, shall annually meet together, on the first Tuesday of June, forever, to elect and choose trustees as aforesaid, for the managing, ordering and disposing of the said lands: and that the trustees of every preceding year, so chosen and elected as aforesaid, the survivor or survivors of them, having the said lands granted and conveyed to them in manner and form aforesaid, shall annually and successively, forever, in like manner grant and convey the said lands, unto the trustees of the next succeeding year, so to be elected and chosen as aforesaid."

The plaintiff also gave in evidence the Hardenburgh patent, bearing date the 20th of April, 1708, granting to Johannis Hardenburgh and six others, a tract of vacant and unappropriated land adjoining the Rochester and other patents on the northwesterly side, thus making "*the great mountains commonly called the blue hills,*" the dividing line between the two

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patents. The plaintiff then gave in evidence a series of conveyances and devises, showing that in April, 1849, she became the owner of lot No. 47, in great lot No. 4 of the Hardenburgh patent. But it was also proved that assuming the blue hills to be the dividing line of the two patents, the lot claimed by the plaintiff to be lot No. 47, in great lot No. 4 in the Hardenburgh patent was, in fact, within the Rochester patent.

The plaintiff also gave in evidence a deed, bearing date the 13th day of February, 1778, which, upon its face, purported to have been made "between *Colonel Jacob Hoornbeck*, Andreas De Witt, Esq. and Capt. Joachim Schoonmaker, jun. the present trustees of the lands and premises of the town of Rochester, Benjamin Hoornbeck, Hendrick Hoornbeck and Johannis Osterhout, jun. freeholders of said town, *of the one part*, and Colonel Johannis Hardenburgh, of Rosendale, in the county of Ulster, Robert R. Livingston, Esq. of Dutchess county, Samuel Verplanck, late of the city of New-York, merchant, now residing at Fishkill, in the said county, *of the other part*, reciting that whereas doubts have arisen between the trustees of the said town of Rochester, and *the proprietors* of the Hardenburgh patent, relative to the true bounds of the said town of Rochester, on which bounds the Hardenburgh patent is butted and bounded. In order, therefore, to reconcile these doubts, the said trustees of the said town, together with Benjamin Hoornbeck, Hendrick Hoornbeck and Johannis Osterhout, jun. three assistant freeholders, chosen by the freeholders of the town at their annual election, held on the 4th day of June, 1776, did, after several meetings with some of the proprietors of the said Hardenburgh patent, on the 21st day of June, 1776, mutually conclude and finally agree on certain lines to be run for the true bounds of Rochester, saving and reserving certain lands thereafter mentioned to the assigns of the trustees of the said town. And whereas, by the mutual consent of the parties, and in the presence of some of them, William Cockburn and John Wigram did, in the month of November following, run and mark out the lines agreeable to the said agreement, which are as follows, viz.: Beginning, &c. which lines so run and marked out,

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are to be held and esteemed forever hereafter as the true bounds of the town of Rochester, *only with respect to the parties of the second part, their respective heirs and assigns*; saving and reserving, nevertheless, the several tracts of land therein-after mentioned. This deed purports to convey to the parties of the second part, their heirs and assigns forever, all the lands to the southwest and northwest of the said agreement lines, that lie within the limits and bounds of each and every of their respective lots or parts or parcels of lots, that are claimed by the said parties of the second part, *by reason of their being proprietors and part owners of the said Hardenburgh patent*, and all such right, estate, title, interest and demand whatsoever, as they the said parties of the first part had or ought to have, by reason of their being trustees of the lands and premises of the town of Rochester as aforesaid. To have and to hold, &c. By the same deed the parties of the second part, for and in consideration of the premises, released to the parties of the first part, their heirs, successors and assigns forever, all the lands, &c. that lie between the Sandbergh and the bounds of Marbletown, within and to the eastward of the said agreement lines, so run and marked out as aforesaid, so far as each and every of the said parties of the second part have a right in these respective lots, by being proprietors and part owners of the Hardenburgh patent.

This deed was executed by only two trustees, Andreas De Witt and Joachim Schoonmaker, jun. Jacob Hoornbeck, described in the body of the deed as one of the trustees and a party to the deed, did not execute it. A place for his signature, with a seal, was left vacant. The deed was acknowledged by William Cockburn, a subscribing witness, on the 17th of February, 1778, and recorded on the 25th of the same month. The defendants objected that this deed was not properly proved to be read in evidence, because the subscribing witness did not state that he knew the parties to be the persons described in the instrument, and because there was no evidence of the special character of the parties as trustees. They further objected to the admission of the deed in evidence on the following grounds:

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1. Because it was full of erasures and interlineations, not noted or explained, and because a leaf had evidently been cut out and replaced. 2. There was no proof that the three professed assistants, or freeholders, were such, and therefore a majority of those acting for the town had no authority so to act. 3. The deed was executed by but two of the three trustees named in the body of it. The trustees were joint tenants, made so by the Rochester patent and the law, and had no authority to sever the joint tenancy by the separate conveyance of two of them. The power of sale and disposition in the trustees was a joint power, and could not be exercised without the concurrence of all. 4. The instrument showed that the two trustees, being mere naked trustees, without any beneficial interest in the lands, *gave away* a large portion of the lands of the town which they had no right to do, and the deed was therefore void. 5. The deed was void as a bargain and sale, for want of a consideration expressed in it. The only consideration was land which they were supposed to get from the Hardenburgh patent, and which they could not hold if it lay in that patent. 6. One of the stipulations of said agreement was unlawful, as altering the bounds of the town. The objections were overruled, and the deed was admitted in evidence. The defendants' counsel excepted to the decision of the court.

The plaintiff then offered in evidence a counterpart of the deed, claiming to give the same in evidence as an ancient deed and a muniment of her title, to which the defendants took the same objections as to the original deed.

The plaintiff also offered in evidence, as an ancient deed and muniment of title, a paper purporting to be an agreement between the trustees of the town of Rochester and some of the proprietors of the Hardenburgh patent, bearing date the 21st of June, 1776. This paper purported to be signed by two of the Hardenburgh proprietors, the three trustees of the town of Rochester, and two of three persons who had been appointed a *committee* to join and consult with the trustees, in order to settle the boundaries. It set forth an agreement that a certain line should be run and monuments erected, and that the trustees of

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Rochester and the owners of the Hardenburgh patent, *as many as could be found*, should release to each other at a joint expense. The execution of the paper was witnessed by Samuel Hoornbeck. The defendants objected to the admission of this paper in evidence, for the following reasons: 1. Because it was materially erased and altered as to date, parties and boundaries, which erasures and alterations were not noted or explained. 2. It was incomplete and inoperative. It speaks of an agreement but does not say who agrees, of a line not run, but afterwards to be run. It does not say what it is to be the line of, and several of those who, by the terms of the instrument, are to be bound by it, and to unite in its performance, have never signed it. 3. It is unsealed and wholly without any consideration expressed in it, except the settlement of a boundary line, and not signed by, or intended to be signed by, the parties necessary to settle the boundary. It is wholly without consideration and inoperative on its face. 4. The trustees were mere naked trustees, holding the mere legal title to the land, without any interest of their own in it. They had no right to part with it, without getting any thing in return. The persons to whom land is so given, have no power to hold it. 5. Being mere naked trustees, they had no power to settle the boundaries. 6. It being a mere executory agreement, there could be no possession under it, the possession, if any, being under the deed. 7. The plaintiff was bound to produce Hunter, in whose custody the agreement was shown to be. 8. The plaintiff was bound to produce the subscribing witness, or show that he was dead. The defendants also offered to show that the witness to the agreement was still alive, and called a witness to prove it. The paper was received in evidence, and the defendant's counsel excepted.

For the purpose of showing that Col. Jacob Hoornbeck was dead, at the time of the execution of the settlement deed, the plaintiff offered in evidence a memorandum found on the fly leaf of the book of records, of the town of Rochester, as follows: "1778, April 10th. We, Andreas D. Witt, Esq. and Joachim Schoonmaker, jun. esq. have taken a view of the books and papers of the trustees, at *the widow of Col. Jacob Hornbeck*

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and Ludowick Schoonmaker, and found in the presence of Jacob Hornbeck, in bonds and bills, as follows :” (mentioning several bonds and bills.) The defendants’ counsel objected to the admission of this evidence, on the ground 1. That it was a mere unsworn memorandum, not made by party or privy, and not a proper subject of entry in the book where it appeared. 2. It contradicted, as far as it proved any thing, the settlement deed under which the plaintiff claimed, that deed stating that Hoornbeck was alive. 3. It was written on the first fly leaf and not in the order of the book. The evidence was received and the defendants’ counsel excepted.

The plaintiff offered in evidence, for the same purpose, a memorandum in the hand-writing of William Cockburn upon the back of a field book of the survey of the settlement line, made by himself and John Wigram, in the following words and figures : “ Field notes of the lines run for the boundary between Rochester and the Hardenburgh patent, 1776.” So much of the memorandum was on the field book found among the papers of the town of Rochester, as well as that produced by the plaintiff. The following was indorsed on the plaintiff’s copy of the field book only : “ The releases were executed on the 13th of February, 1778, by A. D. Witt and Joachim Schoonmaker, the present trustees, (Colonel Jacob Hoornbeck, the other, died in Jany.) Hendk. Hoornbeck, Benjamin Hoornbeck and John Osterhoudt, jun. assistant freeholders, and by Col. Johannes Hardenburgh, Samuel Verplanck and Robert R. Livingston.” The defendants’ counsel objected to this evidence, on the ground 1. That it was a mere unsworn memorandum, not made by a person whose duty it was to make it, and not a proper subject of entry where it appeared. 2. It contradicted the settlement deed under which the plaintiff claimed—that deed stating that Hoornbeck was alive. 3. It came from the custody of those who claimed the benefit of it, and was made by their agent, and there was no evidence when it was made. The objections were overruled, and the defendants’ counsel excepted to the decision.

The plaintiff having rested, the defendants called witnesses to show that at the time the settlement deed was executed, Col.

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Jacob Hornbeck was living ; also to show that the settlement line described in the deed was several miles easterly from the base of the blue hills. The defendants alledged, and the evidence tended to support the allegation, that by the settlement deed, 164 square miles, embracing 105,000 acres, were cut off from the Rochester patent.

The judge charged the jury, in substance, that if at the time the settlement deed was executed, Col. Jacob Hornbeck was dead, the deed was properly executed by the survivors, and would be effectual to establish the settlement line, and thus sustain the plaintiff's title ; that if Hornbeck was alive when the deed was executed, then it was void for want of due execution. That if the jury should be of opinion that the memorandum made by Cockburn on the plaintiff's copy of the field book, was made before, or at the time the deed was executed, then it was competent evidence to prove the death of Hornbeck ; but if made after the deed was executed, then it was not admissible evidence for that purpose ; that the memorandum on the fly leaf of the town records was also competent evidence for the jury to consider in determining whether Hornbeck was dead when the deed was executed. The defendants' counsel excepted to that part of the charge in which it was stated that if the deed was executed by two trustees, the third being dead, the deed was valid and established the settlement line. The jury found a verdict for the plaintiff for five dollars damages. Upon a case containing these, with other facts, the defendants moved for a new trial.

J. C. Spencer, for the plaintiff.

A. Taber, for the defendants.

By the Court, HARRIS, J. The judge, at the circuit, was undoubtedly right in holding that the settlement deed, executed as it was by only two trustees, was void, if the third trustee was in fact living at the time of execution. The power of trustees over the subject matter of the trust, is equal and undivided. They can not, like executors, act separately—all must join, both

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in receipts and conveyances. Thus, where a testator gave his estate to two trustees for certain purposes, and, in case one died, authorized the survivor to execute the trust, the refusal of one to act prevented the other from acting during their joint lives. So where a power of sale was given to three trustees, without authority to the survivors, in case of the death of one, it was held that such survivors were incompetent to act without a new appointment. (*Willis on Trustees*, 136, and cases there cited.)

In this case the patent contained authority for the surviving trustees to execute the trusts, in case of the death of one; so that if Col. Jacob Hornbeck was dead, on the 13th of February, 1778, the settlement deed might legally have been executed by the survivors; but if he was alive, his execution of the deed was as necessary as theirs, to constitute a valid conveyance. It became, therefore, important to determine upon the trial, whether Col. Hornbeck was alive when the deed was executed. Upon this question I think the burden of proof rested upon the plaintiff. The trustees were to be chosen annually. Col. Hornbeck had been elected one of the trustees, in June, previous to the date of the deed. He was, of course, then alive. The deed, upon its face, assumes that he was yet alive, and makes him a party to the conveyance. Under these circumstances it was necessary for the plaintiff, in order to avail herself of the benefit of the deed, to show that Hornbeck was really dead when the other trustees executed it. This she attempted to do. For this purpose she offered in evidence a memorandum, found on the fly leaf of the book of records of the town of Rochester, which speaks of the wife of Col. Hornbeck as his widow, and refers to an examination which the other trustees had made in respect to the trust property which had been in the hands of Hornbeck. This memorandum bears date the 10th of April, 1778. There is no evidence to show by whom, or under what circumstances it was made. It formed no part of the record properly made by any person, whose duty it was to make entries in the book. Indeed, it was not entered as any part of the record. The fact of its being found on the fly leaf imparts to the memorandum no more effect as evidence than it would have had if found upon

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any other paper in the hands of the officers of the town. All that can be said of it is, that somebody, no one knows who, at some time, no one knows when, for some purpose, no one knows what, not as a record, not in the course of business, nor in the discharge of any duty, has seen fit to make this memorandum. I know of no rule of evidence, nor any precedent which would allow such an entry to be made use of as proof, to show that, on the 13th of February, 1778, Col. Hornbeck was not alive. I think it should not have been admitted.

Nor do I think the memorandum indorsed by Cockburn on the field book admissible evidence to prove the death of Hornbeck. It is nothing more than the written declaration of a third person, in respect to a matter with which he had nothing to do. The general rule is, that such declarations, though he by whom they were made is dead, can not be given in evidence. It can not be known that he was under any strong motive to speak the truth. It is true that what a man has himself *actually done*, and committed to writing, he being under an obligation to do the act, and it being done in the discharge of his duty, may be submitted to a jury as evidence that the act, thus committed to writing, was in fact performed. "The general principle," says Story, J. in *Nichols v. Webb*, (8 *Wheat.* 326,) "is, that memorandums made by a person, in the ordinary course of his business, of acts or matters which his duty, in such business, requires him *to do* for others, in case of his death, are admissible evidence of the acts and matters so done." (*See also Welsh v. Barrett*, 15 *Mass. Rep.* 381; *Halliday v. Martinet*, 20 *John.* 172.) Thus, the entries of clerks, of what they have done in the usual course of their business, have been received to prove the facts stated in those entries, when the clerks who made them are dead. (1 *Stark. Ev.* 315.) An entry made by a notary, of what he has done in the customary business of his office, may be evidence of his acts when he is dead. So, the memorandum made by a bank messenger, in the usual course of his employment, stating a demand of payment and notice to an indorser, is admissible as evidence of such demand and notice, when he is dead. Other cases might be mentioned, in which such entries have been

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received in evidence ; but, in every instance, it has been where the entries related to some act performed by the party making them, in the discharge of his duty, and in the usual course of his business. To extend the rule beyond this limit, would be contrary to the most obvious principles of justice.

It is true, the learned judge instructed the jury to disregard the evidence, if they should be of opinion that the memorandum was made after the deed was executed. How the jury were to determine this question I am unable to perceive. There is nothing in the case to show when Cockburn made this memorandum. He might have made it at the time the deed was executed, and he might equally well have made it twenty years afterwards. But, whenever made, it was not competent evidence to prove the death of Hornbeck. It was not made in the discharge of any duty. It related to no act which Cockburn himself had performed. The same memorandum, made by any other man, would have been equally admissible.

Rejecting the evidence derived from the memorandum made by Cockburn, and the entry upon the fly leaf of the town records, I do not perceive that any evidence is left, to overcome the presumption that Hornbeck was alive when the deed was executed. The deed, therefore, was not shown to have been duly executed. Upon the principles stated by the learned judge himself, in his charge to the jury, and with entire accuracy, the deed itself should not have been submitted to the jury as furnishing any evidence of a conveyance by the trustees of Rochester to the proprietors of the Hardenburgh patent. It was void, for the want of due execution.

I think, too, that the settlement agreement of the 21st of June, 1776, ought not to have been received without proof. It was admitted as an ancient deed or muniment of title. The mere existence of any instrument for more than thirty years is not enough, in any case, to authorize it to be read in evidence. Kent, Ch. J. in *Johnson v. Blanshaw*, (3 *John*. 292,) says, "It is the accompanying possession alone which establishes the presumption of authenticity in the ancient deed. Where possession fails, the presumption in its favor fails also. The length of the

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date will not help the deed, for if that was sufficient a knave would have nothing to do but to forge a deed with a very ancient date. (*See also Healy v. Moule*, 5 *Serg. & Rawle*, 185; *McGinnis v. Allison*, 10 *Id.* 197.) The theory upon which such evidence is allowed is stated by Starkie with remarkable clearness and felicity of language as follows: "Presumptions are frequently founded upon, or at least confirmed by ancient deeds and muniments, found in their proper legitimate repositories, although, from lapse of time, no direct evidence can be given of their execution, or of their having been acted upon. It seems, however, that in order to the reception of such evidence, or at least to warrant a court in giving any weight to it, *a foundation should be first laid for its admission by proof of acts, possession or enjoyment*, of which the document may be considered as explanatory." (1 *Stark. Ev.* 66.) So Gilbert says, "If possession has not gone along with it there should be some account of the deed, because the presumption fails where there is no possession, for it is no more than old parchment, if no account be given of its execution." (*Gilb. Ev.* 103. *See also Norris' Peake*, 163; *Jackson v. Laraway*, 3 *John. Cas.* 283; *Hunt v. Luquere*, 5 *Cowen*, 221.)

Middleton v. Mass, (2 *Nott & McCord*, 55,) was, like this, an action of trespass to try the title to a tract of land. The plaintiff produced a deed, dated in 1739, which had been proved before a magistrate and recorded in the auditor's office a few days after its execution. He offered no proof of its execution, nor did he prove any possession of the land, or any acts of ownership over it, so that the question was whether it was admissible as an ancient deed, without proof of its execution. The presiding judge being of the opinion that it was not, the plaintiff offered to prove that the deed had been in possession of himself and those under whom he claimed, for more than thirty years, and contended that it ought to be admitted on this proof. But the judge thought otherwise, and the plaintiff was nonsuited. A motion was made to set aside the nonsuit, on the ground that the deed ought to have been received in evidence as an ancient deed, on the proof of the possession of the deed

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alone for the time mentioned. The motion was denied. Johnson, J. in delivering the opinion of the court said, "It is not the place only where an ancient deed is found that always makes it evidence, *but it is when the possession is according to the provisions of the deed.*"

In this case, as I understand the facts, it is not pretended that there has been such a possession as would furnish a presumption of the authenticity of the instrument from that source alone, even if it were an instrument which, if proved, would sustain a claim of title. It was necessary, therefore, before it could be read in evidence, that some proof of its execution should be adduced. It was proved that the subscribing witness to the agreement was still alive and residing in this state. No reason was given why he was not produced. I think the omission was a fatal negligence on the part of the plaintiff.

I am inclined to think that the instrument was also objectionable on account of the alterations appearing upon its face, but I do not sufficiently understand the materiality of those alterations to express an opinion upon this question. The rule on this subject, as stated by Phillips, is that, "if there is any blemish in the deed by rasure or interlineation, the deed ought to be proved, though above thirty years old, and the blemish satisfactorily explained. (1 *Phil. Ev.* 477. See also 1 *Stark. Ev.* 344. *Buller's N. P.* 255. *Jackson v. Osborn*, 2 *Wend.* 555. *McMicken v. Beauchamp*, 2 *Miller's Lou. Rep.* 290.) In the latter case the court take the broad ground that writings erased or interlined are presumed to be false. (*Provost v. Gratz*, 1 *Pet. C. C. R.* 364. *Morris' Lessee v. Vanderen*, 1 *Dall.* 64.)

For these errors in the admission of evidence, a new trial must be awarded. If upon that trial the plaintiff shall succeed in overcoming the difficulties already noticed, other questions of very grave importance, may arise, some of which were discussed with great learning and diligence by the very able counsel who argued this motion, but the decision of which is neither necessary nor appropriate to the proper disposition of the application.

New trial granted.

[ALBANY GENERAL TERM, Sept. 1, 1851. *Harris, Watson and Wright, Justices.*]

RUSSELL vs. GRAY and MARGERSON.

Where, upon the trial of a replevin suit, the defendants recover a judgment for the value of the property, and they subsequently collect the same, such judgment and satisfaction, by operation of law, will transfer the title to the property to the plaintiff; and in an action of trespass brought by him against the defendants, for taking and carrying away the property, the defendants will be estopped from disputing the plaintiff's title.

As between the parties to process, and their privies, the return of a ministerial officer, stating his official doings in the execution of that process, is, with some exceptions, conclusive evidence.

Defendants in a replevin suit, after having recovered the property, or its value, on the ground that the sheriff has delivered it to the plaintiff, will not be allowed to defeat an action of trespass brought by the latter against them, for taking and carrying away the property, by impeaching the return upon which they have so recovered.

The 17th section of the replevin act, (2 R. S. 525,) was enacted for the benefit of the sheriff, and not of the party. The indemnity therein mentioned is for his security, and what shall be the extent and form of it, is for him, and no one else, to determine.

As soon as the inquisition is found by the jury, under that section, it becomes a question exclusively for the sheriff to decide, to which party he will deliver the property; or, if he delivers it to the plaintiff, what indemnity he will require.

THIS was an action of trespass for taking and carrying away a span of horses, sleigh and harness. It was tried at the Greene circuit in June, 1850, before Mr. Justice Wright. The property in question, with other property, was taken by the sheriff of Greene in January, 1847, by virtue of a writ of replevin issued by the plaintiff in this suit against the defendant Gray and two others. A claim of property, interposed by the defendants in the replevin suit, was tried on the first day of February, and decided by the jury in favor of the claimants. A bond of indemnity, bearing date the same day, was executed by the plaintiff and one surety, and delivered to the sheriff on the 7th or 8th of February. The affidavit of justification, indorsed upon the bond, was made on the 4th of February. On the 4th of March, 1847, the sheriff delivered the property to the plaintiff's agent. The sheriff made the following return to the writ: "I do hereby certify and return to the within writ, that I took the within

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specified goods and chattels in order to make delivery thereof to the plaintiff within named; but before such delivery was made, Alexander Kiersted, Norman H. Gray and William Ford claimed the same, and demanded that such claim should be tried by a jury. Whereupon a jury was called by me, and such jury, under their oaths, made and returned to me the inquisition annexed hereto, by means whereof I could not replevy and make delivery thereof as within commanded, until the said plaintiff within named, together with John Johnson, executed to me a second bond in the penalty of twelve hundred dollars, that being at least double the value of said goods and chattels appraised by Peter Moe, and in the sum required by law, and thereupon, on the execution and delivery to me of said last mentioned bond as aforesaid, whereby I was indemnified to my satisfaction, and on plaintiff's refunding to the claimants the fees of the sheriff and the jury for trying such claim, I did replevy and make delivery to the plaintiff in the said writ, by Solomon Cooke his agent, of the said goods and chattels as within I am commanded. And I do hereby certify that the sureties in the replevin bond given to me by the within named plaintiff, were John Johnson of the city of Brooklyn, and county of Kings, and James M. Neely, of the same place, and I have also duly caused the within named defendants to be summoned to appear according to the exigency of the within writ. Robert Fuller, sheriff, by B. O. Stone, deputy."

The next day after the property was delivered to the plaintiff's agent, the defendants went to him and took it from him forcibly.

Upon the trial of the cause the circuit judge decided that the return of the sheriff to the writ of replevin could not be used as evidence to prove, and did not prove, even *prima facie*, that the sheriff was indemnified after the jury had returned their inquisition. To this decision the plaintiff's counsel excepted. The plaintiff's counsel also objected to the evidence offered to prove that the bond of indemnity was delivered to the sheriff several days after the inquisition, on the ground that the evidence was immaterial, and also on the ground that the sheriff's return was

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conclusive, and could neither be contradicted nor explained by parol. The objection was overruled, and the plaintiff's counsel excepted to the decision.

The testimony being closed, the court decided that the execution of the writ of replevin was imperfect, and that, it appearing that the claim of property had been tried and found in the claimants, and the new bond of indemnity not having been delivered to the deputy sheriff until seven days after such trial, it came too late; that the plaintiff had therefore failed to show such an interest in the property as to entitle him to maintain the action. The plaintiff was therefore nonsuited.

E. Cooke, for the plaintiff.

John Adams, for the defendants.

By the Court, HARRIS, J. It was assumed upon the trial, by the counsel for both parties, that upon the trial of the replevin suit, the title to the property in question had been found to be in the defendants in that suit, and that they had recovered judgment therefor. If, as it was alledged and not denied upon the trial, the defendants, upon the trial of the replevin suit, recovered judgment for the value of the property, and have collected that judgment, such judgment and satisfaction, by operation of law, transferred the title to the property to the plaintiff. It is upon the principle that *solutio pretii emptionis loco habetur*. (2 Kent, 387, and cases there cited.) Assuming the fact to be that the defendants had been satisfied for the value of the property, I do not see why the defendants in this action were not estopped from disputing the plaintiff's title. But, as this fact seems rather to have been assumed than admitted, it may be proper to examine the case without reference to the result of the replevin suit.

The return of a ministerial officer, upon returnable process, stating his official doings in the execution of that process, is *prima facie* evidence of the facts stated therein; even in an action between third persons, and where those facts come collat-

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erally in question. (1 *Phil. Ev.* 391.) It is so because it is the official act of a man acting under oath. (*Hyskell v. Given*, 7 *Serg. & R.* 371. *Dutton v. Tracy*, 4 *Conn. R.* 79.) There are cases in which such a return is held to be not only *prima facie*, but conclusive evidence against those who were neither parties nor privies to the process upon which it was made, but generally, such persons, when affected by it, are at liberty to contradict or vary its effect by other proof.

As between the parties to the process and their privies, the return is, with some exceptions, conclusive evidence. In the replevin suit neither party would be at liberty to question the caption and delivery of the property as stated in the return. If false, direct proceedings might have been taken to correct it, or an action might have been sustained by the party injured by its falsity. But in that action the parties were bound by the facts stated, so far as they related to official acts. Thus, the return was conclusive evidence that the property had been delivered to the plaintiff, so that the defendants, if they succeeded in the action, would be entitled, as a matter of right, to a judgment for the return of the property, or, if they elected, for its value. The return being thus conclusive against the plaintiff, ought, in justice, to be equally conclusive in his favor. If he is made liable for the property in consequence of the delivery proved by the return, the same evidence ought to be conclusive in his favor, against the same parties, or their privies. Nothing could be more unjust than to allow the defendants in the replevin suit, after they have recovered the property, or its value, on the ground that the sheriff had delivered it to the plaintiff, to defeat this action by impeaching the return upon which they had so recovered. No rule of evidence, properly applied, can produce such a result. The defendant Gray was a party to the replevin suit. It does not appear that the other defendant had or claimed any interest in the property. Under these circumstances, I think the return should be regarded as conclusive evidence between the parties to this suit. (See *Baker v. McDuffie*, 23 *Wend.* 289.)

But let it be assumed that the evidence to show that the bond

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of indemnity was in fact received by the sheriff seven or eight days after the claim of property was tried, was properly received, still I think the plaintiff ought not to have been nonsuited. As I understand it, the 17th section of the replevin act (2 R. S. 525) was enacted for the benefit of the sheriff, and not the party. The revisers, in their note to the section, state that it was framed in conformity to the law applicable to the seizure of property upon execution. In such case, if a third person claimed the property, a writ *de proprietate probanda* was executed, and if the jury found that the property belonged to the claimant, the sheriff was not bound to proceed without indemnity. So here, the sheriff, after taking possession of the property, is required, if a claim of property is interposed, to detain the property taken, in his own custody, until "the claim is inquired into and decided according to law." He may then, *if indemnified to his satisfaction*, deliver the property to the plaintiff, notwithstanding the jury have found in favor of the claim, upon his refunding the expense of the inquisition. What shall be the extent and form of this indemnity is for the sheriff, and no one else, to determine. It is for his security, not that of the party. Unlike the bond taken upon the receipt of the writ, no provision is made for the assignment of this indemnity to the defendant. No action is given to any other party upon it. The chief use of the provision seems to be to enable the sheriff to protect himself against any liability he may incur to any person, not a party to the suit, who may chance to own the property. This view of the effect of the statute derives some support from the 18th section, which imposes a penalty upon the sheriff for delivering the property after it has been claimed, and *before* inquisition, but none for delivering it *after* inquisition and without indemnity. If he should choose to take this risk after the decision upon the claim, the legislature evidently thought it not worth its while to protect him against it. (*See Spencer v. McGowen*, 13 Wend. 256.) If I am right in this construction of the statute, it follows that as soon as the inquisition was found, it became a question exclusively for the sheriff to decide to which

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party he would deliver the property ; or if he would deliver it to the plaintiff, what indemnity he would require.

How it happened that more than a month elapsed before the property was delivered by the sheriff, does not appear. If it was the fault of the sheriff he undoubtedly rendered himself liable for any damages incurred by the delay. It was his duty to determine, at least within a reasonable time after the decision of the jury upon the claim, to which of the parties he would deliver the property. But until such delivery the property was in the custody of the law, and if the defendants in the replevin suit proceeded to sell it upon execution, that sale was illegal. I am of opinion that the motion to set aside the nonsuit should be granted.

[ALBANY GENERAL TERM, September 1, 1851. *Harris, Parker and Wright, Justices.*]

WURTS and JENKINS, executors, &c. vs. JENKINS.

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An action may be maintained by executors against their co-executor, to compel him to pay a debt he owes the estate, and which is necessary to pay a sum decreed by the surrogate to be due from the estate to the plaintiffs for moneys paid by them on account of the estate.

The surrogate's decree, upon a final accounting of the executors, is no bar to such an action, where it appears that the defendant had never rendered an account of the debt due from him to the estate, and the same was not embraced in the proceedings upon the final accounting.

DEMURRER. The plaintiffs alleged that James Jenkins, late of New Paltz, in the county of Ulster, died in January, 1845, having previously made and published his last will and testament, wherein he appointed the plaintiffs and the defendant executors ; that the will was proved, and all the executors took upon themselves the burden of its execution ; that an inventory was filed on the 12th of June, 1845 ; that the defendant was indebted to the testator, at the time of his death, in the sum of

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\$1345, upon an account for goods, &c. which had not since been paid; that this debt was not included in the inventory, the plaintiffs having no knowledge thereof, and the defendant falsely and fraudulently withholding the same from their knowledge and from the inventory; that a final accounting had been had before the surrogate of Ulster, and the sum of \$1672.19 was decreed to be due from the estate to the executors, for moneys paid by them on account of the estate; that the whole of this amount was paid by the plaintiffs and was yet due to them; that the defendant had never paid the amount due from him or rendered any account of it as a debt due the estate, and had refused to render any account of it, or to pay it, and still refused. The plaintiffs prayed that the defendant might be decreed to pay the amount he thus owed the estate.

The defendant demurred to the complaint upon the grounds, 1. That the plaintiffs had not legal capacity to sue, being co-executors with the defendant; 2. That the plaintiffs had not stated facts sufficient to constitute a cause of action or to entitle them to relief; and 3. That the plaintiffs were not the proper parties to demand the relief sought.

E. Cooke, for the plaintiffs.

J. Hardenburgh, for the defendant.

By the Court, HARRIS, J. Two questions are presented by this demurrer; first, whether one executor may maintain an action against his co-executor; and second, whether the surrogate's decree upon the final accounting is a bar to such an action. The first question has been determined against the defendant in *Smith v. Lawrence*, cited by his counsel upon the argument. (11 *Paige*, 206.) In that case, a surrogate had dismissed an application made by one executor against his co-executor for an account. Upon appeal the chancellor reversed the decision. "A court of equity," he says, "from its peculiar mode of administering justice, can settle the questions as to the fact of indebtedness, and as to the amount due from one of the executors to

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the estate, of which both are trustees, whenever the decision of those questions becomes necessary, without changing the possession of the fund; and when the amount of such indebtedness is ascertained, the court may make such disposition of the fund as justice and equity shall then require." He then proceeds to say, that he can see no valid objection to a similar proceeding before the surrogate, where the object is the same.

Decker v. Miller, (2 *Paige*, 149,) was, like this, a bill filed by two executors against their co-executor, to compel him to pay a debt he owed the estate, which was necessary to satisfy a debt due to one of the plaintiffs. It was held that the debt which the defendant owed the estate was assets in his hands for the payment of debts, and that the plaintiff having a debt against the estate, was entitled to have such assets applied to its satisfaction.

It is scarcely necessary to say that this court is vested with the same jurisdiction which the late court of chancery possessed, and that since the distinction between proceedings at law and in equity has been abolished, an action may be maintained in any case in which, under the former practice, either a suit at law or a bill in equity might have been maintained.

The defendant's counsel is also mistaken as to the effect of the final accounting. The statute, in express terms, limits the effect of the surrogate's decree to the matters embraced in the account. It furnishes no evidence in respect to any matter not appearing upon the face of the account. (2 *R. S.* 94, § 65.) Here, it is alledged that the defendant has never, in any manner, rendered an account of the debt as due from him to the estate. If this be so, he can not set up the decree upon the final accounting as a bar to his liability. The plaintiffs are, therefore, entitled to judgment upon the demurrer, but the defendant may have liberty to answer upon the payment of costs.

[ALBANY GENERAL TERM, September 1, 1851. *Harris, Watson and Wright, Justices.*]

BARBER vs. CARY.

On the 4th December, 1846, the plaintiff executed two mortgages on the same premises, for the purchase money; one to S. for \$221,56, payable in nine equal annual installments; and the other, for \$86,23, payable to the defendant in three equal annual installments, the first to become due December 4, 1856. It was agreed the mortgage to S. should be the first lien on the premises. This mortgage was subsequently assigned by S. to the defendant, and was foreclosed under the statute. Upon the sale of the premises, on the 5th of January, 1850, the same were struck off to M. for \$431,50, a sum larger than the amount due upon the mortgage, with the costs of foreclosure. *Held* that the defendant was entitled to have the mortgage for \$86,23, first satisfied out of the surplus moneys; and that the plaintiff was entitled only to the balance remaining, after paying that mortgage, with interest.

THIS was an action brought by the plaintiff to recover of the defendant the sum of \$136,40, being the surplus moneys upon a mortgage sale, received by the defendant's attorney, and which the plaintiff claimed as belonging to him. The defendant, by his answer, claimed a right to retain the surplus moneys by virtue of another mortgage for \$86,23, upon the same premises, executed by the plaintiff, and which was due and unpaid. The cause was tried before Mr. Justice Mason at the Chenango circuit on the 8th April, 1851. On the 4th December, 1846, the plaintiff executed two mortgages on the same premises, one to William G. Sands for \$221,56, which was assigned to the defendant on the 25th June, 1849, payable in nine equal annual installments, with interest annually on all sums unpaid, first installment to become due 4th December, 1847. The other mortgage was payable to the defendant for \$86,23, with interest annually from date, to be paid in three equal annual installments, the first installment to become due 4th December, 1856. The mortgage given to Sands was foreclosed by statute foreclosure, and the premises were struck off to Ira E. Merrill by the auctioneer, on Saturday the 5th January, 1850, at three or four o'clock P. M., for \$431,50.

The plaintiff claimed the surplus moneys after paying the Sands mortgage and the costs of foreclosure, while the defend-

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ant claimed that they should be applied on the mortgage for \$86,23, payable to himself, which he presented to the auctioneer for the purpose. On the trial the defendant asked the judge to charge the jury that he was entitled to have the surplus moneys applied upon his mortgage, but the judge charged that the defendant was not entitled to have the surplus so applied; to which charge the defendant excepted.

The two mortgages were not only given at the same time but were both given for the purchase money. The mortgage of smaller amount given to the defendant, contained a clause giving a prior lien to the Sands mortgage, in consideration that Sands had held a judgment which was a lien on the land before the mortgages were given and which judgment was cancelled upon the giving of said mortgages. The jury found a verdict for the plaintiff for \$137,21, and judgment was entered for that sum.

R. J. Baldwin, for the plaintiff.

John Wait, for the defendant.

By the Court, Monson, J. It seems to be a principle well settled, and indeed is not denied by the counsel for the plaintiff, that the defendant was entitled to retain out of the moneys arising on the sale, not only sufficient to satisfy the amount of the installments then due, but also sufficient to satisfy those to become due thereafter on the mortgage foreclosed. (*Cox v. Wheeler*, 7 Paige, 248.) But why does not that go the length of deciding this claim in favor of the defendant? What reason can there be for distinguishing between these mortgages, under the circumstances of this case. The objection that the installments of the smaller mortgage are not yet due, applies, as it seems to me, with as much force against the installments not due on the one foreclosed.

But these two mortgages are in fact to be regarded as only one instrument, since they were given at the same time and relate to the same subject matter. (3 Wend. 234. 1 Hill, 601. 3 Barb. Sup. Court Rep. 141. *Id.* 399.) Authorities

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seem to concur with the reason and justice of the case. In *Eddy v. Smith*, (18 *Wend.* 488,) Smith held a mortgage and judgment upon the same premises. He foreclosed the mortgage by statute, and claimed to apply the surplus moneys to satisfy his subsequent judgment against the claim of the plaintiff, who was a bona fide purchaser of the rights of the mortgagor, and his, the defendant's, claim was sustained. It seems to me that the case before us is a stronger one in favor of Cary the defendant's claim, than the case cited was in favor of Smith's claim, because in that case a judgment was allowed to be satisfied which was a general lien, and which was given more than a year afterwards for a different consideration, and that too against a bona fide purchaser of the mortgagor; while in the case before us it is a mortgage, a specific lien, given at the same time with the one foreclosed and for the same subject matter, which is asked to be satisfied as against the mortgagor himself. In *Bartlett v. Gale* (4 *Paige*, 504,) where land was sold on a judgment, it was held that a subsequent mortgagee had a lien on the surplus moneys, to the amount of his mortgage; that the sheriff had no right to pay the surplus moneys to the mortgagor, nor could the mortgagor discharge them; that the purchaser was chargeable with the amount of his bid to the extent of the subsequent mortgage, after paying off the judgment on which the premises were sold; that he bought only the right and title of the mortgagor subject to the prior incumbrances, although the purchaser claimed that those should be deducted from his bid, or else he would suffer a loss, as the land was not worth enough to pay the subsequent mortgage including the prior incumbrances. In *Astor v. Miller*, (2 *Paige*, 68,) it was held that where real or personal estate upon which there is an outstanding mortgage is turned into money, the rights of the mortgagee continue unaltered, and the court will direct the application of the money according to the rights of the parties as they existed previous to the alteration of the estate.

The action in this case is for money had and received, which is an equitable action and will lie whenever the defendant has received money belonging to the plaintiff, which, according to

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natural equity and justice, he ought to refund or pay over. It takes the place of a bill in equity, and should not be extended to cases where the defendant may be deprived of any right, or subjected to any inconvenience. The plaintiff can only recover what remains after deducting all just allowances. The charge and defense are both governed by the true equity and conscience of the case. The defendant may defend himself by showing that the plaintiff *ex aequo et bono* is not entitled to the whole of his demand, or any part of it. The plaintiff must show that he could recover in a court of equity. (13 *Wend.* 490. 2 *Barb. S. C. R.* 145 to 147. 2 *Denio*, 93. 1 *Doug.* 138. 2 *Burr.* 1010. 4 *Id.* 2133, 2134. 2 *T. R.* 370. *Cowp.* 793.)

I see no reason for saying that the defendant has waived the lien of the smaller mortgage by purchasing the other, or the one having a preference. Neither is there force in the objection that by allowing the defendant to retain the amount of the smaller mortgage, there would be left in his hands a bond to be enforced as it fell due, without remedy to the plaintiff. For what would be the remedy of the plaintiff when the mortgaged premises are sold on foreclosure upon default in the payment of certain installments, where the mortgagee is allowed to retain of the surplus moneys enough to satisfy future installments as they become due, or where the mortgaged premises are sold subject to future installments, and purchased in by a stranger or by the mortgagee. In any case where the debt is paid, the mortgagor who gave the bond would have a right in equity to restrain the holder of the bond from prosecuting the same at law. (7 *Paige*, 257.)

But it is said by the plaintiff's counsel, that by allowing the defendant to retain the amount of his smaller mortgage, he would obtain payment before it became due. If the debt is on interest, that of course is saved, and if the debt is not on interest, a deduction may be made by way of rebate of interest; while on the other hand, if the defendant is not allowed to retain the amount of this mortgage, the lien is entirely lost, and the value of the bond would depend upon the solvency of the grantor. Which, therefore, is the greater evil, to have the debt paid be-

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fore due, or to have the debt lost? Besides; this objection, that the debt would be collected before due, applies with equal force, in my judgment, to the installments not due on the mortgage foreclosed, where it is allowed to have no weight at all.

I am, therefore, clearly and decidedly of the opinion which I entertained and expressed when this case was before us on a former occasion, that the defendant was entitled to have the mortgage in question satisfied out of the surplus moneys arising from the sale of the Sands mortgage, after satisfying the same with costs of foreclosure.

After expressing this opinion upon the principal question in this cause, perhaps it is unnecessary to discuss a minor point, which, if found to be adverse to the plaintiff, the only effect would be to turn him round to another action and postpone the decision of this cause upon its merits; but I am also of the opinion now, as on the former occasion, that the defendant should have had a reasonable time after the sale to make out the necessary papers, and to pay over the surplus moneys, if any were due, and that such time was not allowed before this suit was commenced. (6 *Coven*, 13. 7 *Id.* 53. 10 *Verm. Rep.* 474.)

The auctioneer was delayed by the non-payment of the money by the purchaser for several hours. It had got to be evening. His family were sick and required his attention. He had to adjust the costs and make out the affidavits and other papers. The foreclosure was not complete, the title did not pass to the purchaser until a conveyance was executed. (4 *Denio*, 45, 46.) That was the first in order to be done. Mason said he had rather make out the papers and carry them to Oxford, the distance of 8 miles, and pay over the surplus money, the next morning, or which is the same thing, on Monday morning, as the next day was *dies non juridicus*. But this offer was not accepted. The demand was made of the defendant at his house in Oxford, between 10 and 11 o'clock at night. The money was then in the hands of Mason, the defendant's attorney, at Norwich, to whom it had been paid, and where it had remained since it was paid, whose business it was to dispose of it and make out the papers, and so the defendant stated to the plain-

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tiff's attorney. The summons and complaint were then served immediately. No reason is assigned by the learned counsel for the plaintiff for this untimely haste. It is not pretended that the plaintiff's right would have suffered had the suit not been commenced till Monday. A man should exercise his rights in a reasonable manner, and pay a cautious regard to the rights of others. (17 *John.* 99, 306. 16 *Pick.* 227.) I think the verdict of the jury was against evidence.

Upon the whole I am of opinion that the judgment should be reversed, with costs to abide the event.

Judgment reversed.(a)

[TOMPKINS GENERAL TERM, September 2, 1851. *Mason, Shankland and Monson*, Justices.]

(a) Justices Mason and Shankland did not concur in the above opinion, upon the last point—as to time.

ARNOLD and others vs. JERUSHA DOWNING, adm'x of M.
Downing.

A decree made by a surrogate, establishing the indebtedness of an intestate's estate, upon a promissory note given by the decedent, and ordering a *pro rata* payment thereon, out of the assets, does not amount in law to a promise, on the part of the administratrix, to pay the balance; so as to deprive her of the benefit of the statute of limitations.

In order to take a demand out of the statute of limitations, by a part payment, it must appear that the payment was made on account of the debt for which the action was brought. And it must further appear that the payment was made *as part payment of a larger debt*.

To make a part payment evidence of a promise to pay the balance, it must be voluntary, on the part of the debtor; and it must occur under such circumstances as are consistent with an intent to pay such balance.

THIS cause was tried at the Chenango circuit, in September, 1850. The suit was commenced March 23d, 1850, on a promissory note given to the plaintiffs January 12, 1839, for \$133,24, and signed by the defendant's intestate, Marshal Downing. The

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defense was the statute of limitations. The facts relied upon to take the case out of the operation of the statute were, that the maker died March 6, 1840. There were two indorsements on the note, viz. January 12, 1841, \$29,35, and March 16, 1843, \$17,60. The administratrix, on March 7, 1843, presented a petition to the surrogate of Chenango, praying for an order authorizing the sale of the real estate of the decedent to pay debts. On the 18th of July, 1843, an order of sale was made, in pursuance of the prayer of said petition. On the 10th of July, 1843, the surrogate made an order establishing certain debts as being due from said estate, among which was a debt to the plaintiff of \$126,42; the whole indebtedness of the estate in the aggregate, as settled by said order or decree, amounting to \$2611,14. This was followed by an order for the distribution of the avails of the estate among the creditors, which allowed the plaintiff the sum of \$9,31, as his share of said estate. On the 10th of October, 1844, the administratrix appealed from the order of the 1st of July, 1843, establishing the debts, but no further proceedings were had on said appeal.

The defendant moved for a nonsuit on this evidence, for various reasons, among which were the following, viz. That the statute of limitations had attached, and that no payment had been proved of the money ordered to be distributed by the surrogate, and that if such payment had been proved, said order, and the payment by virtue thereof, by the surrogate, could not revive the debt, so as to enable the plaintiffs to recover on the note. And that the evidence was insufficient to enable the plaintiff to recover in this action. The court overruled the motion, and the defendant excepted. The counsel for the defendant then asked leave to go to the jury on the question whether there was a new promise proved by the evidence. But the court refused to submit the question to the jury, and directed them to find a verdict for the plaintiff. To all which decisions the counsel for the defendant excepted, and he now appealed to this court.

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H. Bennett, for the appellant.

Southworth & Prichard, for the respondents.

By the Court, SHANKLAND, J. The note was due immediately, and allowing the creditor the benefit of the eighteen months, as provided by statute, to be added, in consequence of the debtor's death, (2 R. S. 448, § 8,) the seven years and six months elapsed on the 28d of July, 1846. (3 Hill, 36.) And as this suit was not instituted until March, 1850, the question turns upon the effect of the surrogate's decree and order for distribution. Neither the administratrix's petition nor the order of sale to pay debts, nor any of the other proceedings before the surrogate, mention any particular debt as due to the plaintiffs, or whether it was upon a note. But as no objection seems to have been raised for the want of that proof, I shall take it for granted that the indebtedness to the plaintiff, as established by the decree, was on this note. The question then is, whether the decree of the surrogate establishing the indebtedness on this note, and ordering a *pro rata* payment out of the assets of the decedent, is in law a promise on the part of the administratrix to pay the balance, so as to deprive her of the benefit of the statute of limitations. It seems to me quite clear that it is not. In order to take a demand out of the statute of limitations, by a part payment, it must appear that the payment was made on account of the debt for which the action is brought. And it must further appear that the payment is made *as part payment of a larger debt*; because the principle upon which a part payment takes a case out of the statute is, that it admits a larger debt to be due at the time of the part payment. Unless it amounts to an admission that more is due, it can not operate as an admission of any still existing debt. On this principle it was held, in the case of *Deyo v. Jones*, (19 Wend. 491,) that the consent of an executrix of her husband, that a note of her husband which was barred by the statute, might be deducted from a legacy due to her, by her father's will, did not amount to a promise to pay the balance of the note, so as to revive the debt against her as such

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executrix of her husband; although said note was owned by the estate of her father. And the court say, "that the admission, to avoid the statute, must amount to an unqualified acknowledgment of the debt, without any circumstance connected therewith indicating an intention not to become liable upon it. So in *Davis v. Edwards*, (6 *Eng. Law and Eq. Rep.* 520,) it was held that a payment on a note, made by the assignee of an insolvent under the directions of the insolvent debtor's court, was insufficient to take the case out of the statute of limitations, as against the insolvent, or the other makers of the note. (6 *Mees. & W.* 824. 1 *Exch. Rep.* 117.) Some of the English cases hold that there must not only be a part payment of the debt, but even an express promise in writing to pay the balance, in order to save the statute. (1 *Exch. Rep.* 118.) But since, there the rule has been changed, and an actual payment of part of a larger debt, is evidence of a promise to pay the balance, (*Cleave v. Jones*, 4 *Eng. Rep.* 514,) although not in writing, the same as was held, before the statute, requiring new promises to be in writing. It has been so held in Massachusetts also, under their act, which is similar to the English statute, and to the present code of this state. (9 *Metc.* 482. *Code*, § 110.)

But in order to make a part payment, evidence of a promise to pay the balance, it must be voluntary on the part of the debtor, and it must occur under such circumstances as are consistent with an intent to pay such balance; which is not the case when the payment is involuntary, or in the course of administering the assets of insolvents, bankrupts, or under decrees of surrogates. In this case the answer expressly denies that the payment was made by the administratrix, or with her assent; and there is no proof that it was so made.

But if the complaint was founded upon the decree of the surrogate, instead of the note, still the statute of limitations would be a valid bar, because those courts are not courts of record, and the 18th section of the statute of limitations (2 *R. S.* 224) declares judgments of courts not of record to be barred in six years. The statute (2 *R. S.* 206, § 1) declares the several courts treated

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of in the first chapter of the act to be courts of record ; in which chapter surrogates' courts are not included.

For the above reasons, the judgment should be reversed and a new trial granted, with costs to abide the event.

[CHENANGO GENERAL TERM, January 18, 1852. *Mason, Crippen, Shankland and Gray, Justices.*]

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GARDNER vs. OLIVER LEE AND COMPANY'S BANK.

The plaintiff, a resident of this state, drew five bills of exchange upon G. who resided in Boston, payable to the order of the defendant, which were accepted by G. and when they became due they were protested for non-payment. G. was afterwards discharged from his debts, under the insolvent laws of Massachusetts ; the defendant proving these bills of exchange before the officer upon those proceedings, and accepting a dividend from G.'s estate. The defendant recovered a judgment against the plaintiff upon two of said bills of exchange, as the drawer thereof, and commenced another suit against him, to recover the amount of the other three bills. On a complaint praying that the defendant might be restrained from collecting the said judgment, and from the further prosecution of the second suit; *Held*, on demurrer,

1. That the discharge of G., the acceptor, would have been no bar to an action by the defendant as holder, or the plaintiff as drawer, if the defendant had not voluntarily proved its demand, and accepted a dividend out of G.'s estate.
2. That the proving of the bills, by the defendant, and accepting a dividend from the acceptor's estate, rendered the defendant a party to the insolvent proceedings, and discharged the liability of the acceptor, upon those bills.
3. That the defendant, by making such proof, and becoming a party to those proceedings, had precluded itself, and any person who might derive title to said bills, from suing the acceptor thereon, and had deprived the plaintiff of any right of action or remedy over against G., the acceptor, if he should pay, or be compelled to pay, or take up, such bills, as the drawer thereof ; which right of action would otherwise have remained unimpaired.
4. That such act of the defendant operated, or might operate, to the prejudice or injury of the plaintiff, because he was deprived of the right to collect such bills out of the future acquisitions of the acceptor. That he consequently had a good defense to the bills of exchange.
5. That such defense might be made in the suits brought upon the bills of

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exchange, and that it should be there made, and not by an application to this court for affirmative relief, either against the judgment, or bills of exchange in suit.

A party has now no right to commence an action, against one holding a note or bill against him, to determine the holder's right thereto, or to compel the cancellation thereof, where such right did not exist before the new system of pleading was adopted, or before courts of law and equity were blended together and held by the same judges.

THE questions in this case arose upon a demurrer to the complaint. It appeared from the complaint that in October or November, 1847, one Charles D. Gibson was indebted to the plaintiff in large sums of money specified therein, and that during those months, and while such indebtedness existed, the said Gibson was a resident of the city of Boston, and the plaintiff drew five bills of exchange upon him, payable to the order of the defendant's cashier, which were duly accepted by Gibson at Boston, and when they became due they were protested for non-payment. That on the tenth day of January, 1850, the defendant in this action recovered a judgment against the plaintiff upon two of said bills of exchange, as the drawer thereof, amounting to \$4136,25 damages, besides costs. That on or about the 20th June, 1848, the defendant in this action commenced a suit against the plaintiff, Gardner, to recover the amount of the other three bills of exchange; that notice of appearance had been served by the defendant in that suit, but no further proceedings had been had therein. The plaintiff in his complaint in this action, then set out the insolvent laws of Massachusetts, and averred that Gibson was a resident of Boston, and that on or about the 29th of November, 1847, he presented his petition to a master in chancery, as provided by said laws, for a discharge from his debts, and prosecuted the same until he procured his discharge as provided by said acts. That on the 8th day of July, 1848, the defendant in this action then and there voluntarily and without the knowledge, consent, or permission of the plaintiff, Gardner, proved before the said master the debt which the said Gibson owed the said defendant, upon and by reason of the said five bills of exchange, in such manner as to entitle the defend-

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ant to a dividend out of the proceeds of said Gibson's estate, and that on the 12th day of October, 1848, the said master in chancery granted to Gibson a discharge from his debts. The defendant was a banking association created under the laws of this state, and the plaintiff was at the time of drawing said bills of exchange, and has ever since been, a resident of this state. And it was claimed by the plaintiff that the matters set up in the complaint showed that without the voluntary appearing of the defendant and proving said debt it would not have been discharged, but that by such appearance and proving the debt Gibson was discharged from all liability upon said bills of exchange. The plaintiff by his complaint sought to restrain the defendant from collecting said judgment, and the further prosecution of said suit for the recovery of the amount of the other three bills of exchange. To this complaint the defendant demurred and assigned various causes of demurrer.

T. C. Welch, for the plaintiff.

S. G. Haven, for the defendant.

By the Court, HOYT, J. It appears by the insolvent laws of Massachusetts, which are set out in the complaint, among other things, that all debts due and payable by the insolvent debtor at the time of the first publication of the notice of the issuing of the warrant therein provided for, may be proved and allowed against his estate, and all debts then absolutely due, though not payable until afterwards, may be proved and allowed; and in case the debtor shall be liable in consequence of having made or executed any bill of exchange or promissory note before the first publication of said notice, or in consequence of the payment by any party to any bill or note of the whole or any part of the money secured thereby, or of the payment of any sum by any sureties of the debtor in any contract whatsoever, although such payment in either case be made after such first publication, provided it be made before the first dividend, such debt shall be considered for all the purposes of said acts, as con-

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tracted at the time when the said bill, note, or other contract shall have been so made or indorsed, and may be proved or allowed as if said debt had been due and payable by said debtor before the said first publication. The act further declares that, upon the debtor complying with its provisions as therein specified, the judge shall grant a certificate, and the debtor shall thereupon be absolutely and wholly discharged from all his debts, (except debts created by defalcation as a public officer, &c.) which shall at any *time be actually proved* against his estate, assigned as therein provided, from all debts (except, &c.) which are provable under said acts, and which are founded upon any contract made by him after the act of 1838 went into operation, *if made or to be performed* within the commonwealth of Massachusetts, and from all debts which are provable as aforesaid, (except, &c.) which are founded upon any contract *made by him* after the said act of 1838 went into operation, and due to any *persons who shall be residents* within the commonwealth of Massachusetts at the time of the first publication of the notice of the issuing of said warrant. That it is provided in and by said acts, that no discharge under said acts shall release or discharge any person who may be liable for the same debt, as a partner, joint contractor, indorser, surety or otherwise, for or with the debtor.

It will be seen by an examination of these acts, that the certificate of discharge, by the terms of the acts, is designed to discharge the debtor as follows: 1st. From all debts which shall in fact be proved. 2d. From all debts which are provable under said acts, and which are founded upon any contract made by him within the state of Massachusetts, or to be performed therein. 3d. From all debts which are provable and founded upon any contract due to any person resident within the state at the time of the first publication of the notice of the issuing of the warrant.

It appears that neither the plaintiff or defendant was a resident of the state of Massachusetts at the time of the making or acceptance of these bills of exchange, or at any time since. It is claimed by the defendant that these bills of exchange were

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drawn on and accepted by Gibson, at Boston, and were payable there, and that the acceptor would be discharged by his certificate from these debts, whether they were proved for the purpose of a dividend or not. The complaint alleges that Gibson was a resident of Boston, and that the bills were drawn upon, presented to, and accepted by him at Boston. It appears, therefore, that the acceptor's contract was made in the state of Massachusetts. The provisions of the acts of that state as to what debts shall be discharged, are in substance the same as is provided by our own insolvent laws; (2 *R. S.* 24, § 30;) and under that act, in a case where the debtor resided and the contract was made in this state, and to be executed here, it was held that a discharge of the debtor, under such law, was a discharge of the debtor from such debt, although the creditor was a resident of Pennsylvania, and though he did not petition for the debtor's discharge, or accept of a dividend out of his estate. (*Parkinson v. Scoville*, 19 *Wend.* 150.) In the case of *Sherill v. Hopkins*, (1 *Coven.* 103,) the bond was made in this state, though neither the obligor or the obligee were residents of this state. The court, after adverting to several cases in our own state, (9 *John.* 325; 17 *Id.* 168; 19 *Id.* 153; 16 *Id.* 223; 3 *Caines*, 154,) and to 4 *Wheat.* 129, 209; 13 *Mass. Rep.* 16, and 1 *East*, 6, say "that in all these cases considerable importance seems to be attached to the circumstance, that one or both of the parties were inhabitants of the state or country where the contract was made; but that all these cases stand upon a principle entirely independent of that circumstance. It is that of the *lex loci contractus*, that the law of the place where the contract is made must govern, whether the parties to the contract are inhabitants of that place or not. That the rule is not founded upon the allegiance due from citizens or subjects to their respective governments, but upon the presumption of law that parties to a contract are conusant of the laws of the country where the contract is made; and that it is made with reference to those laws, and that they, therefore, form a part of the contract. That this is the principle of the rule, is evident from the exceptions to it. For where it appears that the place of performance is

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different from the place of making the contract, then it is to be construed according to the law of the place where it is to be performed, though neither of the parties reside or owe allegiance there." The court held in that case, that the bond having been made in this state, and it not appearing upon its face that it was payable elsewhere, was to be construed according to the laws of this state; and having been made after the passage of the law under which the defendant was discharged, such discharge was no violation of the contract, and was therefore valid. It seems to me this case was put upon the proper grounds. In the case now under consideration, Gibson's contract was made in Massachusetts, and I think the true construction of his contract, when read in connection with the insolvent laws of that state, would be that if Gibson should become insolvent and obtain his discharge as an insolvent debtor, under the laws of Massachusetts, it should operate as a discharge of his liability upon such bills of exchange, without reference to the residence of the holder thereof. And as an original question, or if at liberty to follow the cases cited, I think we ought so to hold, whether the creditor proved the debt and accepted a dividend or not. But the supreme court of the United States, in the case of *Ogden v. Saunders*, (12 *Wheat.* 213,) where a bill of exchange was drawn by one Jordon, of Kentucky, on Ogden, in New-York, who was a citizen of, and accepted the bill in the city of New-York, and who was afterwards discharged as an insolvent debtor, under the insolvent laws of this state, held that such discharge did not operate to discharge him from such debt which was due to a citizen of another state, though the contract was made in New-York. And in delivering the opinion of the court, Justice Johnson laid down the following propositions, as having been determined by the court: 1st. That the power given to the United States to pass bankrupt laws is not exclusive. 2d. That the fair and ordinary exercise of that power, by the states, does not necessarily involve a violation of the obligation of contracts made after the passage of the law. 3d. But when in the exercise of that power, the states pass beyond their own limits and the rights of their own citizens, and act upon the rights of citi-

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zens of other states, *there arises a conflict* of sovereign power and a collision with the judicial powers granted to the United States, which renders the exercise of such a power *incompatible with the rights of other states, and with the constitution of the United States.*

This case having been decided by a vote of four of the judges against three, and those concurring with Justice Johnson in the last proposition, being those who were in the minority upon the other questions in the case, it was thought the questions might not be deemed definitely settled; and in the subsequent case of *Boyle v. Zacharie & Turner*, (6 Pet. 348,) Mr. Wirt, in behalf of the plaintiff, inquired of the court whether the opinion of Mr. Justice Johnson, delivered in the case of *Ogden v. Saunders*, (12 Wheat. 213,) was adopted by the other judges who concurred in the judgment in that case. Chief Justice Marshall said, "the judges who were in the minority of the court upon the general question as to the constitutionality of state insolvent laws, concurred in the opinion of Justice Johnson in the case of *Ogden v. Saunders*. That opinion is therefore to be deemed the opinion of the other judges who assented to that judgment. Whatever principles are established in that opinion are considered no longer open for controversy, but the settled law of the court." The court afterwards said that the effect of an insolvent discharge was at rest, so far as it is covered by the antecedent decisions made by that court. (6 Peters, 642.)

The supreme court of the United States having thus declared that a state insolvent law, which professes to discharge an insolvent from a debt due to a citizen of another state, though the contract should be made in the state where the discharge is granted, if the creditor does not become a party to the proceedings, is in conflict with the constitution of the United States, such decision is binding upon state courts, and it is their duty to respect it. And these decisions have been followed by the courts of Massachusetts in giving a construction to the insolvent laws of that state. In the case of *Fisher v. Foster*, (10 Metc. 597,) a bill of exchange was drawn by a citizen of the state of Maine in favor of another citizen of that state, upon a citizen of

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Massachusetts, who accepted the same. It was held that a discharge of the acceptor, under the insolvent laws of Massachusetts, *was not a bar* to an action against him by the payee, who had not proved his claim thereon against the insolvent's estate. And the same doctrine is recognized by the court of errors in *Van Hook v. Whitlock*, (26 Wend. 53,) as having been settled, though the judge who delivered the opinion of the court in that case, does not regard it as decided that it would not be a bar when the party is sued in the state where the discharge is granted. But it was so held in the case of *Fisher v. Foster*, (*supra*.) The case of *Parkinson v. Scoville*, (19 Wend. 150,) before cited, arose on a motion to set aside an execution, and appears to have been decided solely upon the reading of our statute, and without any reference to or examination of the cases already referred to by me. And although, as an original question, I should be disposed to adopt the principles decided in the cases in our own courts, we think we are bound to follow the decisions of the United States court so far as regards the constitutionality of state insolvent laws, and their effect upon citizens of other states, and must hold that the discharge in this case would have been no bar to an action by the defendant as holder, or the plaintiff as drawer, of these bills of exchange, if the defendant had not voluntarily proved its demand and accepted, or entitled itself to, a dividend out of the estate of the acceptor.

That the proving of these bills by the defendant, and accepting a dividend from the acceptor's estate, under the proceedings for his discharge as an insolvent debtor, renders the defendant a party to those proceedings, and discharges the liability of the acceptor upon those bills, although he would not have been discharged if such proofs had not been made, is clearly settled by the case of *Clay v. Smith*, (3 Pet. 411.) It therefore follows that the defendant, by making such proof and becoming a party to such proceedings, has precluded itself and any person who may derive title to said bills, from maintaining any action thereon against the acceptor, and has deprived the plaintiff of any right of action or remedy over against the acceptor if he should pay, or be compelled to pay or take up such bills as the drawer thereof. And

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which right of action would otherwise have remained unimpaired. This clearly operates, or may operate, to the prejudice or injury of the plaintiff, because he is deprived of the right to collect such bills out of the future acquisitions of the acceptor. (3 *Brown's Ch. R.* 1. 5 *Barb. S. C. R.* 520. 18 *Ves.* 26. 7 *Hill*, 250. 2 *Ves.* 540.) We think, therefore, that the plaintiff, by his complaint, shows that he had a good defense to the bills of exchange upon which said judgment was obtained, and that he has such defense to the remaining bills of exchange now in suit.

But it is urged as one ground of demurrer that the plaintiff may avail himself as fully and perfectly of the discharge of Gibson, by way of defense to the suit now pending, and that the complaint does not show or state that the defendant is seeking or endeavoring or threatening to enforce the judgment against the plaintiff, and that the plaintiff does not show any valid or sufficient grounds for granting to him the relief asked for in the complaint, either as to said judgment or as to said bills of exchange.

This is probably equivalent to alledging that the facts set forth in the complaint do not constitute a cause of action, for the reasons stated in the demurrer. If we are right in the conclusion at which we have arrived, that the proving of the indebtedness upon these bills by the defendant, under the insolvent proceedings, discharges the plaintiff from all liability as drawer of said bills of exchange, we are unable to see how the plaintiff shows himself entitled to the relief he asks against the judgment. It appears from the complaint that the debt was proved, and Gibson's discharge granted, long before the judgment against the plaintiff was obtained. This would have been a good defense to the plaintiff's claim for which such judgment was obtained, and should have been set up and proved in that action. If that suit was commenced before such discharge was granted, there was ample time after such discharge and before the recovery of the judgment, to have interposed a plea in bar of the further prosecution of that action; as some fifteen months elapsed after the discharge was granted before the judgment was obtained, and the complaint does not show any reason or excuse why such

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defense was not set up in that action. There is no allegation of any fraud in the recovery of said judgment, or that the plaintiff was not, before said judgment was obtained, fully aware of the existence of the facts which it is now claimed constitute such defense.

If a party has a defense like this to an action, and omits to set it up, and suffers judgment to pass against him, he is not entitled to relief against such judgment, unless it has been procured by some fraud, or he did not know of the existence of the facts constituting the defense, or has unavoidably or inadvertently omitted to set them up. And even then it may well be doubted whether the remedy of the party, when the judgment has been obtained in a court of record, which can exercise an equitable jurisdiction over its own judgments, and has power to relieve a party on account of any such fraud, mistake or inadvertence, should not be by a motion in such action, to be relieved from the judgment and permitted to interpose such defense and try the cause upon its merits. But this question it is not now necessary or proper to decide, as it is possible the plaintiff may be able to make a case which may entitle him to pursue his remedy by action. But he has not in his complaint shown any facts which would authorize the setting aside of the judgment, either upon motion or by an action to be relieved against such judgment. Yet as the demurrer in this case is to the whole complaint, the defendant is not entitled to judgment if the plaintiff has shown a good cause of action for any of the matters set up in his complaint. It therefore becomes necessary to examine and determine whether the plaintiff has shown a right to maintain an action to be relieved from the bills of exchange, for the recovery of which an action is now pending. We think a similar difficulty exists as to this branch of the case. No issue has yet been joined in that action, and the plaintiff in this suit has the right to hasten the proceedings in the other cause, and of compelling the plaintiff therein to proceed; and he also has a right to interpose as a defense in that suit, the same matters which he alleges in this suit entitles him to the relief demanded. There are no facts alleged in the complaint

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to show that any injury can accrue to the plaintiff in awaiting the determination of the other action now pending.

It may be the plaintiff in this action may have evidence of the facts which he sets up, which may be lost, or there may be danger of losing, by delay in prosecuting the other; or in case the plaintiff therein should omit further to prosecute that suit; but no such or any other allegation or reason is shown for coming in and asking affirmative relief against the prosecution of said bills of exchange, instead of interposing such matters as a defense thereto.

Under the former system of law and equity, a party could set up such matters as a defense to an action at law upon the bills of exchange, but he could not bring an action at law for the relief demanded in this case. If he sought such a remedy and relief as the plaintiff asks in this case, it could only be obtained in a court of equity, and then he was required to show good and sufficient reasons, rendering it necessary to come into such court for affirmative relief, instead of interposing the matters as a defense at law. (*Morse v. Hovey*, 9 *Paige*, 198. *Perine v. Striker*, 7 *Id.* 598.)

Courts of equity entertained jurisdiction to compel the surrender of bills of exchange and promissory notes, which were negotiable and which might be transferred to an innocent holder before due, when it was shown that the party had a good defense to such bill or note, but of which defense he might be deprived by such transfer. But in the present case the bills of exchange have long since been due, and they can not be transferred by the defendant so as to give the holder any greater rights than the defendant now has. Some other special reason would therefore be required to be shown to give a court of equity jurisdiction to grant such relief, as is asked in this case. And although courts of law and equity are now blended, and a uniform system of pleading has been, or attempted to be, adopted for the two courts; still, I think that no new rights of action have been conferred thereby; or in other words, a party has now no right to commence an action against one holding a bill or note against him, to determine his right thereto, or to compel the cancella-

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tion thereof, where such right did not exist before the new system of pleading was adopted, or before courts of law and equity were blended together and held by the same judges.

We are clearly of the opinion that the plaintiff has not, by his complaint, shown a right to maintain an action for affirmative relief, either against the judgment or the bills of exchange, now in suit; and that the matters alledged are, or might have been, a good defense to all of the bills of exchange mentioned in the complaint. The defendant is, therefore, entitled to judgment upon the demurrer. But as the plaintiff may, perhaps, by an amendment, be able to obviate the difficulties suggested, he should have leave to amend on payment of costs.

[ORLEANS GENERAL TERM, February 9, 1852. *Taggart, Marvin and Hoyt*, Justices.]

 MAYNARD vs. TALCOTT.

A demurrer to a complaint will not lie, on the ground that the complaint does not aver or show that the debt for which the action was brought had become due at the time of the commencement of the action.

Where it does not affirmatively appear that the suit was commenced before the cause of action accrued, the court will not intend that it was, for the purpose of supporting a demurrer to the complaint.

If the court is to presume either way, the presumption should be that the debt sued on was due before the commencement of the action.

THE question in this case arose upon a demurrer to the complaint. The action was upon a promissory note bearing date the 16th of January, 1850, payable six months after date. The only cause of demurrer relied upon was that it was not averred and did not appear in and by the complaint that the note had become due at the time of the commencement of the action. There was no statement in the complaint of the time of the commencement of the action, or that the note had become due before the suit was commenced; and the complaint was not dated.

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P. C. Whiting, for the plaintiff.

J. L. Talcott, for the defendant.

By the Court, HOYT, J. Under the former system of pleading it was held that a declaration entitled of the term generally related to the first day of term; and where issue was joined upon it, and it appeared upon the trial that the plaintiff's cause of action did not become due until after the first day of term, the plaintiff was permitted to show, by evidence, the actual time of the commencement of the suit to be different from that which it purported to be, by the record. (*Lester v. Jenkins*, 8 Barn. & Cress. 239. *Granger v. George*, 5 Id. 149. *Milton v. Gilderstone*, 5 Barn. & Ald. 847. *Morris v. Pugh*, 3 Burr. 1241.) Where it appeared upon the face of the declaration that the cause of action did not become due until after the commencement of the suit, as it appeared by the title of the declaration, it was held to be a good cause of demurrer. (3 John. 42. *Lowry v. Lawrence*, 1 Caines, 69. *Waring v. Yates*, 10 John. 119.) But it was also held that a demurrer would not lie for such cause, unless it appeared affirmatively upon the face of the declaration that the cause of action was not due when the suit was commenced. (*Pugh v. Robinson*, 1 T. R. 116. *Owen v. Watters*, 2 Mees. & W. 91. *Gurney v. Hill*, 2 Dougl. N. S. 936. *Granger v. Dacre*, 12 Mees. & W. 431.) The principles settled by these cases was fully recognized in 1 Ch. Pl. 262, 265, 267, 268. In *Pugh v. Robinson*, the declaration was entitled generally of Michaelmas term, the first day of which was the 7th of November, and the promise and breach were alledged to have taken place on that day. The defendant demurred specially that the declaration, by the entitling, appeared to have been delivered before the cause of action accrued. The court said that they must resort to the old practice of declaring *ore tenus*; and by referring to that, they found that the declaration could not be delivered until the actual sitting of the court, and then it was as *probable* that the promise and breach occurred before the

declaration as afterwards ; and they would not intend that they occurred afterwards, for the purpose of upholding the demurrer.

The declaration under the former practice, when the suit was commenced by *capias ad respondendum*, did not necessarily show that the cause of action accrued before the commencement of the suit. The practice required the declaration in such case to be entitled of the term at which the writ was returnable, and it was sufficient to prevent a demurrer to alledge that the cause of action accrued on the day previous to that stated in the title ; still for any thing that appeared upon the declaration, the writ may have been issued and served months before. This was because it did not affirmatively appear that the suit was commenced before the cause of action accrued.

So in the case under consideration, it does not affirmatively appear that the action was commenced before the cause of action accrued, and we should not intend that it was, for the purpose of supporting the demurrer. We can see that the debt was long since due, and if we are to presume either way, I think the presumption should be that it was due before the commencement of the action. It has been suggested that the complaint should at least be dated, but that would not show the time of the commencement of the action, because the summons may have been issued and served long before the complaint is made or delivered. It has also been suggested that § 142 of the code of procedure requires that the complaint shall contain a plain and concise statement of the facts constituting a cause of action. This is precisely what was always required to be stated in a declaration. But as has been seen, it was not required that the declaration should state the time when the suit was commenced, and it is not required in a complaint. No injury can accrue to the defendant by its omission ; because if the action was in fact commenced before the cause of action became due, that may be shown on the trial, and it will be a good defense.

The plaintiff must have judgment, with leave to the defendant to withdraw his demurrer and answer, on payment of costs.

[ORLEANS GENERAL TERM, February 9, 1852. *Taggart, Marvin and Hoyt, Justices.*]

JONES vs. PATTERSON.

A husband, after the death of his wife, may maintain an action to recover for use and occupation of the wife's real estate, by the permission of the plaintiff and his wife, during coverture.

DEMURRER to complaint. The complaint alleged that in June, 1845, the plaintiff intermarried with Mary Ann Patterson, who was seised in fee of certain lands described in the complaint, situate in Erie county. The defendant used and occupied the land, with the permission of the plaintiff and his wife, during the coverture. The wife died in May, 1847. The defendant, in consideration of such use and occupation, undertook and promised to pay the plaintiff and his wife such sum as the use and occupation of the premises were reasonably worth, &c. Averment as to the value of the use of the premises. The defendant demurred, on the ground that the complaint did not state facts sufficient to constitute a cause of action; that it did not show any right in the plaintiff to bring the action; and that the administrator or other representative of the wife should have brought the action.

Geo. W. Houghton, for the defendant.

A. Sawin, for the plaintiff.

By the Court, MARVIN, J. The effect of marriage, at common law, to merge the separate existence of the wife, during coverture, and to vest in her husband, during such period, a right to the rents and profits of her real estate. (*Broom on Parties*, § 94.) If the wife is seised of an estate of inheritance in land, her husband upon marriage becomes seised of the free hold *jure uxoris*, and he takes the rents and profits during their joint lives. (2 *Kent's Com.* 130.) The husband may use and occupy the lands of his wife, or he may demise them. The lease will bind him and his wife during the coverture. (7 *John.* 81. *Bac. Ab. Lease, C.*) He may grant and convey the land, and that will pass all his interest. (20 *John.* 301.) He may mortgage the

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land, and it will bind all his interest. (15 *Wend.* 615.) He gains a title to the rents and profits during coverture. (2 *Black. Com.* 434.) And if the wife dies, he shall have the arrearages, (*Co. Litt.* 351, *d.* *Reeve's Dom. Rel.* 30, 31, 32. *Bell on Prop. relative to H. & W.* 53, 175. 1 *Chit. Plead.* 22.)

I am not aware that it has ever been doubted that the husband could recover, after the death of his wife, the arrears of rent which had accrued during the coverture. He could not at common law, after the death of the wife, recover rent in arrear upon the demise of the wife while sole, which had accrued before marriage, but by the statute, 32 H. 8, ch. 35, he was entitled to recover such rent. (*Co. Litt.* 351 *b.* *Bell on Prop. Rel. to H. & W.* 53.) In *Hill v. Saunders*, (4 *Barn. & Cress.* 529,) the husband attempted to recover rent which had accrued after the death of his wife, upon a lease of her lands made by himself and wife, reserving rent to them and *her heirs* and assigns. It was held that he could not recover; that his interest determined at her death. But it was nowhere intimated that he could not have recovered any rent in arrear at the time of the death of his wife. (*See also Broom on Parties*, 98.)

The law vested the husband with the freehold, and he was entitled to the rents in arrear at her death. It is not like chattels real or choses in action not reduced to possession. The premises, during the coverture, belonged to the plaintiff, who consented to their occupation by the defendant, and he has a right now to maintain an action to recover for use and occupation.

Demurrer overruled.

[ORLEANS GENERAL TERM, February 9, 1852. *Taggart, Marvin and Hoyt*, Justices.]

ELLCOTT vs. MOSIER.

Ejectment to recover dower will lie against a tenant who has an estate or interest *less than a freehold*, and before dower has been assigned or admeasured. Such action must be brought against the actual occupant of the premises out of which dower is claimed, if there is any actual occupant.

Where the plaintiff, in her complaint, describes lands in the possession of several tenants, occupying different portions thereof, the defendant occupying but a small part; and the plaintiff claims for her dower one-third of the whole, and obtains a verdict; upon filing the record of judgment, commissioners are to be appointed to make admeasurement of dower out of the lands which the jury shall have *found in the possession of the defendant*, and out of which the plaintiff is entitled to dower.

A plea, in an action of ejectment for dower, alleging that the husband of the plaintiff died intestate; that the defendant occupied the premises under a lease from him, and that the plaintiff and the heirs had collected and received the rents reserved, ever since the death of the husband, as the same became due, and had divided and enjoyed the rents, in proportion to the interest of each in the premises; the plaintiff receiving one-third in lieu of dower; and insisting that the plaintiff was thereby estopped from maintaining the action, does not constitute a defense.

In order to bar the widow of her action for dower, where rent has been assigned with her consent, and accepted by her, it must appear that the rent will endure for her life.

DEMURRER to answers. The action was ejectment, to recover dower in certain premises described in the complaint as land situate in the city of Buffalo, bounded easterly by Washington-street 263 feet, southerly by Swan-street 200 feet, westerly by Main-street 263 feet, and northerly by South Division-street 200 feet. The defendant, for new matter, stated substantially, that the plaintiff's husband was seised in fee simple of the premises, and that in February, 1829, he demised them to Ira Blossom and Lewis F. Allen, for the term of twenty-one years, reserving annual rent; and that by another agreement the time was to be extended, upon the payment of certain rents, twenty-one years from the end of the first term. That Blossom and Allen entered and partitioned the premises, and that subsequently the "Ohio Life Insurance and Trust Company" acquired Allen's rights. That the defendant was in possession only of a portion of the premises, being the first floor of a store

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numbered 239, 80 feet in depth and 18 feet wide, under and by virtue of a lease from the Ohio Life Ins. and Trust Co., and occupied only as tenant for one year. That the plaintiff had never demanded her dower, and that it had never been assigned to her.

For a *further answer* the defendant alleged that the husband of the plaintiff died in 1837 intestate; that the defendant occupied the store under the lease, and that the plaintiff and the heirs had collected and received the rents reserved, ever since the death of her husband, as the same became due, and had divided and enjoyed the rents in proportion to the interest of each in the said premises; and that upon such division one-third of the rents had been received and enjoyed by the plaintiff in lieu of her right of dower in the premises. And the defendant insisted that the plaintiff was estopped from maintaining the action.

The plaintiff demurred to these defenses, and specified several causes of demurrer. The cause was heard at a special term, and judgment rendered for the plaintiff, and the defendant appealed to the general term.

John H. Martindale, for the plaintiff.

John Ganson, for the defendant.

By the Court, MARVIN, J. The principal question presented and argued, is, can the plaintiff maintain this action to recover dower against a tenant who has an estate or interest *less than a freehold*, before dower has been assigned or admeasured? At common law the writ of dower lay against the person only who had *the freehold*, and who ought to have assigned dower to the widow without compulsion. (1 *Roper on Husb. and Wife*, 429, *et seq.*) The heir, or the owner of the freehold, had the right to assign dower. An assignment of dower could not be made by any person who had not a freehold in the estate, or against whom a writ of dower would not lie. Any one possessed of a mere chattel interest, as tenant for term of years, could not assign dower. (1 *Roper on Husb. and Wife*, 389. *Co. Litt.* 35 a. *Bell on Property, Husb. and Wife*, 280. *Crabb on*

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Real Property, § 1141. 4 *Kent's Com.* 68.) After the assignment or admeasurement of dower, the widow could maintain an action of ejectment to recover the possession. (See 17 *John.* 166; 6 *Id.* 290; 7 *Id.* 247; *Hurd v. Grant*, 3 *Wend.* 340; 7 *Cowen*, 287; 10 *Wend.* 419.) It is clear that at common law neither the defendant in this case, nor the lessees of the husband of the plaintiff, or their assignees, could assign dower to the plaintiff. They have not a freehold interest. Their interest is only a chattel interest, and no act of theirs would bind the heir. The counsel for the defendant argues that the statute authorizing ejectment for dower should be construed as a substitute for the writ of dower, and that it should be confined to cases against the *heir or tenant of the freehold*, where the dower has not been assigned or admeasured.

The writ of dower lay only against the tenant to the freehold, (3 *Wend.* 340,) but this writ is abolished. (2 *R. S.* 343, § 24.) The action of ejectment is retained, and may be brought by any widow entitled to dower, after the expiration of six months from the time her right accrued. (2 *R. S.* 303, §§ 1, 2.) If the premises are actually occupied by any person, such occupant is to be named defendant. (*Ibid.*, § 4.) This provision is general, and seems to apply to all actions of ejectment. In *Shaver v. McGraw*, (12 *Wend.* 558,) the action was ejectment for dower. Sutherland, J. doubted whether the principle of the *action of dower* does not control the action of ejectment, and whether ejectment will lie against any other person than the *tenant of the freehold*. The decision did not turn upon this question. In *Sherwood v. Vandemburgh*, (2 *Hill*, 303,) the action was ejectment for dower. The defendant occupied and worked the premises on shares, under the owner of the freehold. It was objected that the action should have been against the tenant of the freehold. Nelson, Ch. J. said "the action of ejectment is now the appropriate remedy for the recovery of dower, and like the action in any other case, must be brought against the *actual occupant*, if there be one." Cowen, J. referred to the doubt expressed in *Shaver v. McGraw*, and said, "On reflection we think it quite clear, however, that ejectment for

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dower, like that action founded upon any other title, will lie, and indeed must be brought against the person in possession if there be one, whether he be seised of a freehold or possessed of a term for years or less estate." This case is in point, and must decide the present case, so far as the question of maintaining the action against the person *actually occupying* the premises, is concerned. A further examination of the provisions of the statute will confirm this view, and show that the action of ejectment may be brought before dower has been assigned. By section 10 the declaration is to state that the plaintiff was possessed of the *one undivided third part* of the premises, as her reasonable dower. By section 55, if the dower has not been admeasured to her before the commencement of the action, she is to proceed to have her dower assigned. The record of judgment is to be filed, and commissioners are to be appointed to make admeasurement of the dower of the plaintiff *out of the lands described in the record*. The writ of possession follows the admeasurement. These provisions clearly show that ejectment for dower may now be brought before dower has been assigned or admeasured, and that it must be brought against the actual occupant of the premises, out of which dower is claimed, if there is any actual occupant.

There would seem to be no great difficulty in this practice, in cases where there is a single occupant of the land, out of which dower is to be admeasured. And such have been all the cases I have examined in our reports since the revised statutes. But will there not be great difficulties in a case like the present? More than twenty years ago the husband of the plaintiff demised certain premises in Buffalo. The lessees, or those holding under and from them, have covered the premises with valuable buildings, and there are now numerous tenants; some occupying a store or a room; and it is understood, that numerous actions of ejectment for dower have been brought against the different tenants. Is the plaintiff to be endowed of a portion of the premises occupied by each defendant? Is she to have admeasured to her a portion of a store or room, and thus have as many different parcels as there are tenants? And if so, what portion is she to have? Her husband did not erect the buildings. It

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is not necessary to attempt now to answer these questions; but it has appeared to me that the legislature could not have contemplated such a case, when it provided the action of ejectment for dower in the first instance, against the actual occupant of the land. In the present case I notice that the plaintiff in her complaint has described (as I understand) all the land leased by her husband to Blossom and Allen, and claims for her dower one third of it. The defendant occupies but a small part of it. By § 55 of the statute, upon the filing of the record of judgment, commissioners are to be appointed for the purpose of making admeasurement of dower *out of the lands described in the record*. The commissioners can not admeasure and assign dower in gross, out of the whole premises described in the complaint. That is an entire united parcel of the whole premises. Certainly not. *Out of the lands described in the record*, means the land which the jury shall have found in the possession of the defendant in the action, and out of which the plaintiff is entitled to dower. But I will not pursue these queries.

When dower has been admeasured there can be no difficulty. The action of ejectment, in such a case, was at common law, and still is, a suitable remedy against any one in possession of the premises. The statute relating to the admeasurement of dower has provided an ample remedy for the widow and for the heirs, or the owners of the land claiming a freehold estate. (2 R. S. 488.) It will also be seen, by reference to the provisions of this act, that the legislature have been careful to preserve the common law principles, applicable to the writ of dower, so far as parties are concerned. If dower has not been assigned, the widow may apply for the admeasurement of dower. The parties to the proceedings are the widow and the heirs of her husband, or if they are not the owners of the land, then the *owners claiming a freehold estate therein*. If she does not apply, the heir or owners claiming a *freehold estate*, or their guardians, may give notice requiring the widow to make demand of her dower. If she neglects to make demand by commencing suit, or by application for admeasurement, &c. the heirs or the *owners claiming a freehold interest* therein, or their guardians, may

apply by petition for the admeasurement of her dower. The land being admeasured to her for her dower, she may bring an action of ejectment to recover it. (See 2 R. S. 488, *Admeasurement of Dower*, §§ 1, 2, 6, 7, 8, 18.) Here the proceedings can not be instituted by the widow against any one who does not claim a *freehold estate in the premises*, out of which dower is claimed. And at common law the writ of dower could only be brought against the tenant of the freehold.

The new matter *secondly* stated does not constitute a defense. It is not, I think, equivalent to a plea, that dower has been assigned by the heir out of the premises. The heir or tenant of the freehold may now, as at common law, assign to the widow her dower within forty days after the death of her husband. It is only the widow who has not *had her dower assigned*, who is authorized by the statute to apply for the admeasurement of dower. (2 R. S. 488, § 1.) If the heir or tenant of the freehold assigns dower to her, and she accepts it, this will bind both of the parties. Dower may be assigned by parol, (4 *Kent's Com.* 63,) and if the widow accepts the assignment, and enters, it will be binding; and rent issuing out of the lands of which she is dowable, or one third part of the rent of the whole land, may be assigned to her for her dower; and if she consents and accepts it for her dower, she will be bound. If she does not consent to accept the rent, she is not bound by the assignment. (1 *Roper on Husb. and Wife*, 392.)

Where the tenant assigned to the widow twenty bushels of wheat every year, for her life, out of lands in which she was entitled to dower, that being in nature of rent, and *accepted by her*, it was held to be a good assignment of dower. An assignment of rent for dower is said to be against common right, and it is therefore the consent and acceptance of the widow which give validity to such assignment; and her consent will not avail, where, from the nature of the transaction, she can not have the like estate or interest in the subject assigned in lieu of dower, as she would have had, if her dower had been assigned in the usual way during her life. The assignment, therefore, with her consent and acceptance of something in lieu of dower, must be

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of some part of the lands of which she is dowable, or a rent issuing out of them, and for *such an interest as may endure for her life* ; and if any of these particulars are wanting, the assignment will be void. (1 *Roper*, 400, 401. *Crabb's Law of Real Prop.* § 1144 to 1147.) Coke does not add the requisite that it must be a rent that will endure for her life. (*Co. Litt.* 34 b.) And *Bell on H. and Wife*, 285 to 289, also admits this qualification.

In the present case, if the answer could be regarded as stating an assignment by the heirs of the husband, of one third of the rent as dower, and an acceptance thereof by the plaintiff as such, it would not, I think, constitute a defense to this action. The rent may not continue during her life. The estate of the tenants is only for years, and the term may expire during her life. In order to bar the widow of her action for dower, where rent has been assigned with her consent, and accepted by her, it must appear that the rent will endure for her life. But I think this answer can not be regarded as a plea of the assignment and acceptance of the rent for her dower in the premises, and nothing short of a direct plea of such assignment and acceptance will be sufficient.

The judgment of the special term for the plaintiff, upon the demurrer, must be affirmed.

[ORLEANS GENERAL TERM, February 9, 1852. *Taggart, Marvin and Hoyt, Justices.*]

DUNN vs. THE COMMERCIAL BANK OF BUFFALO.

Where by the terms of the charter of a bank, and of the certificates of stock issued by the bank, its stock can only be transferred on the books of the bank, by the stockholder or his attorney, the bank is under no obligation to permit a transfer to be made to a person claiming to be the assignee of a certificate, on the presentation of such certificate with an assignment and power of attorney executed by the original holder, in *blank*, no person being named or specified as the assignee or attorney.

Nor can an action of assumpsit be maintained, against the bank, for refusing to permit such transfer, without proof by the plaintiff that he had purchased the certificate, and was the owner thereof.

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A person purchasing stock and taking an assignment of the certificate, executed in blank, is authorized to write in his own name as assignee of the stock, and such name as he chooses, as the attorney to make the transfers. But the naked possession of the certificate and blank assignment and power of attorney is no evidence of title.

Although a bank may have authority to *permit* a transfer of stock to be made, upon its books, it has no right to *make* the transfer, unless empowered by the original holder of its certificates, or by the assignee thereof.

A power of attorney, executed by the assignee of a certificate, authorizing the attorney to ask, demand, and require of the proper officers of the bank to assign and transfer into the name of the assignee, upon their books, the shares mentioned in the certificate, confers no authority upon the attorney, or upon the bank, to make the transfer.

THIS was an action of assumpsit, tried before the late Hon. SETH E. SILL, at the Erie circuit, in September, 1850. The declaration was for refusing to transfer, or permit the transfer, of certain shares of the defendant's stock to the plaintiff, on its books. The defendant pleaded the general issue. The certificates of stock were in the following form :

"No 314.

Commercial Bank of Buffalo.

It is hereby certified that John Cleveland Greene, is entitled to one hundred shares of one hundred dollars each in the capital stock of the Commercial Bank of Buffalo, transferable only on the books of the bank by the said stockholder or his attorney on surrender of this certificate.

In testimony whereof, the cashier has set his hand this 24th day of June, 1836.

100 shares.

J. STRINGHAM, cashier."

Of said certificates, two were in the name of John W. Buckland, and the other two in the name of John Cleveland Greene, and they were all dated June 24, 1836. The plaintiff proved that Israel T. Hatch was the president of the bank at the time of the date of such certificates, and from that time until the year 1840. That there was a stock transfer book kept in the bank, in which transfers of stock were made, and that the book, as well as the other affairs of the bank, was under the general charge of the president.

The certificates were numbered as follows : 303, 304, 305 and

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306; and to each of said certificates, No. 303, 305 and 306, was attached an instrument in the following form: "Know all men by these presents, that I, John Cleveland Greene, for value received, have bargained, sold, assigned and transferred, and by these presents do bargain, sell, assign and transfer unto

one hundred shares of the capital stock of the Commercial Bank of Buffalo hereunto annexed, standing in my name on the books of said bank, and do hereby constitute and appoint my true and lawful attorney irrevocably, for me and in my name and stead but to my use, to sell, assign, transfer and set over all or any part of the said stock; and for that purpose to make and execute all necessary acts of assignment and transfer, and one or more persons to substitute with like full power, hereby ratifying and confirming all that my said attorney or his substitute or substitutes shall lawfully do by virtue hereof. In witness whereof I have hereunto set my hand and seal the sixteenth day of July one thousand eight hundred and thirty-six.

Sealed and delivered in presence of M. H. Fryer.

J. C. GREENE." [L. s.]

To certificate No. 304, was attached a similar instrument, except that the name of John Henry Dunn of the province of Upper Canada, gentleman, was written therein with a pencil in the blank space intended for the name of the assignee, but not in the space intended for the name of the attorney. Two of said instruments were dated November 12, 1836; one July 16, 1836, and one August 6, 1836; and they were numbered with numbers corresponding with the number of the certificate to which they were respectively attached.

The plaintiff then called as a witness George R. Babcock, who testified that the plaintiff resided in Canada in the years 1836, 1837 and 1838. The plaintiff then introduced and proved a power of attorney from him to said George R. Babcock, which was as follows: "Know all men by these presents, that I, John Henry Dunn, of Toronto, Upper Canada, do hereby irrevocably constitute George R. Babcock of Buffalo our attorney with power of substitution to ask, demand and require of the proper officers of the Commercial Bank of Buffalo to assign and trans-

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fer into my name on their books the stock or shares assigned to me by J. C. Greene and J. W. Buckland, or either of them, hereby ratifying and confirming all acts lawfully done in the premises, by our said attorney or his substitute, in virtue hereof. Witness our hand and seal this thirteenth day of December, 1837.

Sealed and delivered in presence of Henry Jessup. JOHN H. DUNN." [L. s.]

J. J. R. Dunn.

The certificates, with the instruments annexed thereto, were received by Babcock from the plaintiff in the fall of 1837, and the power of attorney on the 13th of December of the same year. At the time of their receipt they were annexed together, with wafers; each certificate being annexed to the bill of sale and power of attorney relative to the same. Babcock, after and about the time he received the power of attorney, went with it and the certificates, so annexed to the Commercial Bank of Buffalo, and made a demand of Mr. Hatch, president of the bank, to transfer the said stock on the books of the bank to the plaintiff, and to issue to him new certificates, and at the same time showed him all of said papers. The president declined to make such transfer, but requested a memorandum of the numbers, amounts, and dates of the certificates, which Babcock furnished him. The president made no objection to the form or substance of the papers.

Evidence was given of the value of the stock, from which it appeared that the market value at the time of the demand of transfer was about 50 per cent. The defendant offered to prove that at the time of the demand, it had procured, on its own bill, an injunction against several persons, among whom were the said Buckland and Greene, to restrain them from transferring the stock, and that such injunction had been served on Buckland and Greene, before they transferred to the plaintiff. It did not offer to prove the allegations of its bill, but simply proposed to read the bill and proceedings. The defendant's counsel claimed this to be a full defense to the suit. This defense was excluded, and the defendant excepted.

The counsel for the defendant submitted to the court, that as to the three certificates to each of which an instrument claimed

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to be an assignment and power of attorney was attached, in which said instruments however no person was named or specified as the assignee or attorney, the bank was under no obligation to cause or permit the assignment thereof to the plaintiff on the production of said blank assignments and power of attorney. That as to those three certificates, no evidence had been presented on the trial that the plaintiff was the assignee thereof, or entitled to the same. That as to the fourth certificate, no person was named as attorney. But the court overruled the objections, and ruled and decided that the plaintiff, upon the evidence already given, was entitled to recover as to the whole four certificates. To which decision the counsel for the defendant excepted.

The court charged the jury that the plaintiff was entitled at any rate to nominal damages. The counsel for the defendant excepted. The jury rendered a verdict for the plaintiff for \$22,024.67; and the defendant, upon a bill of exceptions, moved for a new trial.

S. G. Haven, for the plaintiff.

S. G. Austin, for the defendant.

By the Court, TAGGART, P. J. In the case of the *Commercial Bank of Buffalo v. Kortright*, (22 Wend. 348,) the stock, together with a note of \$10,000, was placed in the hands of Barton, with the name of the stockholder indorsed on the back of the certificate, and a seal attached thereto, with express authority to Barton to obtain a loan upon the stock for the sum of \$10,000. Barton negotiated the stock by delivery to Kortright, and obtained a loan of \$25,000. Kortright gave a receipt for the stock, promising to return it on payment of the \$25,000 with interest, on demand, after thirty days from the date of the receipt. Kortright wrote over the signature of the original stockholder a transfer of the stock to himself, constituting S. A. Sherwood an attorney to do all necessary acts to perfect the transfer. After the expiration of the thirty days specified in the receipt given by Kortright, Sherwood went to the Bank of Buffalo and requested permission to transfer the stock, which

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was refused by the original stockholder, who was then acting as president of the bank, on the ground of apprehended difficulty in respect to the note of \$10,000 which had not been transferred to Kortright although he received the \$10,000 from Barton, and as it appeared on trial that he had obtained the note.

There is a manifest distinction between that case and this. Here there is no evidence that the plaintiff Dunn purchased the certificates. He holds in his hands the naked blank assignments and the certificates. He does not prove that he owned them, or had any interest in them whatever. It is true he had possession of the certificates standing in the name of Greene and Buckland, and attached to such certificates were blank assignments and powers of attorney authorizing the transfer to blank by blank attorney. If the plaintiff was the purchaser of these certificates, he was undoubtedly authorized by reason of such purchase, and his ownership thereof, to write in his own name as assignee of the stock, and such name as he chose as the attorney to make such transfer. So far the case of *Kortright v. The Commercial Bank of Buffalo* decides. But it does not decide that the naked possession of the certificates and blank assignments and powers of attorney is evidence of title.

Are certificates of stock, in reference to negotiability, placed on substantially the same grounds as bills of exchange and promissory notes? Are they transferable by mere indorsement and delivery? Are a bond and mortgage or any other evidences of debt not negotiable, assignable by the mere act of writing the name of the party on the back and delivering the instrument with the name so indorsed, without any consideration or agreement? If not, is it not incumbent upon the party claiming under such transfer, to prove the contract or consideration? I have found no case where the holder of an instrument was authorized to write the contract on which he claimed, over the signature or indorsement, except where the proof of the consideration and contract was first made. (See *Leonard v. Vredenburg*, 8 *John*. 29; *Bailey v. Freeman*, 11 *Id.* 121; *Herrick v. Carman*, 12 *Id.* 159; *Nelson v. Dubois*, 13 *Id.* 175; *Campbell v. Butler*, 14 *Id.* 349.) So in the case of *Kortright v. Commercial*

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Bank of Buffalo, an agreement and consideration was proved. But in this case the court are called upon to presume from the plaintiff's possession of the certificates and blank assignments and powers of attorney annexed, that he purchased the stock of Greene and Buckland, and that his name was inserted or assumed to be inserted in the instrument as assignee. The plaintiff not only asks the court to assume the existence of the contract or consideration to support the assignment, but that the name of Israel T. Hatch, or the bank itself, is inserted in the instrument as the attorney of Greene and Buckland, and that they are thereby authorized to assign the stock on the books of the bank to the plaintiff.

It seems to me that this is carrying the rule—already sufficiently broad—beyond all precedents on that subject; and for one I can not consent to extend it beyond cases already adjudicated.

There is another difficulty in the way of the plaintiff's right of recovery. Admitting that he is the actual owner, as assignee, of the stock, the power and authority to assign it upon the books of the bank must come from him. The bank had no authority conferred upon it by the instruments annexed to the certificate. Greene and Buckland had given no power either to the bank or any of its officers. All the power which they had given was in the plaintiff. Although the bank might permit the assignment, it had no authority to make it. The plaintiff authorized Babcock to demand an assignment, not to make it. The power of attorney to Babcock confers no authority whatever upon him, or upon any other person, to make the transfer upon the books. The plaintiff assumes in making that power of attorney, that the bank already possessed all the requisite power to make the assignment, and he therefore simply empowers Babcock "to ask, demand, and require of the proper officers of the Commercial Bank of Buffalo, to assign and transfer into my name on their books the stock or shares assigned to me by J. C. Greene and J. W. Buckland or either of them." He gave Babcock no power to make the assignment, and gave the bank officers no power to make it, but demands of the bank the performance of an act

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which neither it or any of its officers had any authority to perform.

It follows then that the ruling of the judge at the circuit, that "the plaintiff was entitled to recover as to the whole four certificates," and his charge to the jury, to the same effect, was erroneous. A new trial must therefore be granted.

It is unnecessary, with the view I have taken, to notice the other points in the bill of exceptions. Having arrived at the conclusion that the plaintiff is not entitled to recover, on the grounds before stated, I give no opinion upon the decision at the circuit as to the admission or rejection of evidence, or the measure of damages, or whether the proceedings in the court of chancery and service of the injunction constituted a defense to the action.

New trial granted.

[ORLEANS GENERAL TERM, February 9, 1852. *Taggart, Marvin and Hoyt, Justices.*]

IRVINE and others, trustees of the Alleghany and Erie Telegraph Company, *vs.* FORBES.

Where a defendant in a justice's court, on the decision of a demurrer against him, puts in an answer, he thereby waives the demurrer; and the supreme court, on appeal, can not review the decision of the justice in overruling the demurrer.

The members of a private—association as a telegraph company—are not partners. They are tenants in common of the property and franchise belonging to the company, and the majority can not bind the minority, unless by special agreement.

Where it was provided by one of the articles of association of a telegraph company, that as soon as an amount of stock should be subscribed for, equal to half the whole amount required, three trustees should be appointed, one by P., and two *by subscribers of capital for constructing the line*; *Held*, that an election of trustees could not be legally made, without the concurrence of all the stockholders. In such case the stockholders must meet, or at least be notified of the time and place of the meeting at which trustees are to be chosen.

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THIS action was originally commenced before a justice of the peace, upon a subscription by the defendant for \$50 of the capital stock of the Alleghany and Erie Telegraph Company, upon which he had paid \$5. Judgment was rendered in favor of the plaintiffs, for \$45. From this judgment the defendant appealed to the county court, which reversed the judgment of the justice. The plaintiffs then appealed to this court.

Geo. Barker, for the appellants.

F. S. Edwards, for the respondents.

By the Court, TAGGART, P. J. The plaintiffs' right to recover in this action depends upon the construction to be given to the articles of association of the company, for whom the plaintiffs sue as trustees.

By article 3, William P. Pew is authorized to receive subscriptions for the capital stock; ten per cent to be paid or made payable, on demand, and the residue to be paid to the *trustees* when called for, by *public notice, ten days previous to the time of payment*. Calls by installments, not exceeding twenty dollars, upon each share, and at intervals of not less than thirty days between the times of their payment. If a subscriber fails to pay, he forfeits his stock and all prior payments made thereon, and is liable by an action at law or bill in equity, for any deficiency due on such subscription, to be instituted by and in the names of the trustees of the company. By article 6, it is provided that "as soon as an amount of stock shall be subscribed for by *bona fide and responsible subscribers*, equal to one-half of the full amount required for constructing said line, *three trustees shall be appointed as follows*: One by said Pew, and two by subscribers of capital for constructing the line." Two questions are presented upon the pleadings; 1st, by demurrer, on the ground that the plaintiffs, as trustees, can not bring a suit in their own names, but that it must be brought in the names of all the partners, as parties in interest. That by the complaint, it appears that the defendant was one of the parties, and

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the trustees as agents of the company, could not sue the principal. The justice overruled the demurrer, and the defendant then answered, and denied the election of the trustees pursuant to the articles of association.

The second question raised upon the pleadings, is a question of fact, as to the election of trustees. The first question, on the demurrer, is disposed of by the defendant on the decision of the demurrer against him, putting in his answer. He thereby waived the demurrer, and this court can not review the decision of the justice overruling the demurrer. (*Peck v. Cowing*, 1 *Denio*, 222.)

The only question raised upon the pleadings for this court to decide, is whether *the trustees were legally elected*. The plaintiffs represent a private association of individuals. The associates are not partners. They are tenants in common of the property and franchise belonging to the company, and the majority can not bind the minority unless by special agreement. (*Livingston v. Lynch*, 4 *John. Ch.* 573.) If this is a correct view of the case, then the election of trustees could not have been made without the concurrence of all the stockholders.

The only evidence to sustain the election of the plaintiffs as trustees, is contained in the deposition of H. P. Kinnear, taken on commission. He says "he was present at a meeting of the stockholders of the Alleghany and Erie telegraph company when three trustees were chosen. The meeting was held at the Liggins house, in the borough of Youngsville, Warren county, Pennsylvania, on the 21st day of September, 1849. That William A. Irvine, William Meade and Carter N. Kinnear were chosen trustees. The meeting was organized by John M. Kinnear being called to the chair, and E. C. Stacy appointed secretary; after which William P. Pew appointed William A. Irvine, and the stockholders present, *viva voce*, appointed Wm. Meade and Carter N. Kinnear."

Admitting that the commission is properly executed and returned, is there proof here sufficient, *prima facie*, that all of the stockholders were present and participated in the election? The

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witness swears that he was present at a meeting of *the stockholders, &c.* when three trustees were chosen. Had he stopped here the court might, as they undoubtedly would, have inferred in support of the judgment, that all of the stockholders were present. But in answer to the next interrogatory he says, "*The stockholders present, viva voce*, appointed William Mead and Carter N. Kinnear. The term *stockholders present* implies quite as strongly that they were not all present, as the definite article "the," prefixed to "stockholders" in the preceding answer, implies that they were all present. It is pretty evident from the expression *stockholders present, &c.* that they were not all present, and that the trustees were appointed by only a part of the stockholders.

This view of the question is strengthened by the fourth interrogatory and the answer thereto. The witness, in answer to the fourth interrogatory, says that he gave notice to the stockholders in the borough of Youngsville and vicinity, and forwarded by mail notices for the stockholders at different points along the line, of the time and place appointed to choose trustees. The plaintiffs being conscious that they could not prove a meeting of all the stockholders, attempt to save themselves by proving notice of the time and place of meeting to choose trustees. In this they have utterly failed. The only notice proved is to the stockholders in "Youngsville vicinity," and the mailing of notices for the stockholders at different points along the line. The witness does not state that he mailed notices to the stockholders at all the points along the line, nor even at the different points along the line. Nor does it appear that all the stockholders resided at points along the line and in the borough of Youngsville vicinity. It is therefore unnecessary to determine whether mailing the notice is a good service or not.

As the plaintiffs were bound to prove that a valid legal meeting was held, and from the view I have taken of it they have failed to make such proof, it is unnecessary to examine the question as to the validity of the commission, and the question of the proof that a sufficient amount of stock had been subscribed. I am inclined to think, however, that neither of these objections

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is well taken. The commission is properly executed and returned, and the proof of the amount of stock subscribed might as well be made by another witness as the secretary.

It might perhaps have been objected that the testimony of the witness did not prove what it purported to prove, viz. that a sufficient amount of stock had been subscribed; but that objection was not made. The point is not as to the admissibility of the evidence, but as to the effect of it when admitted. I am inclined to think that the plaintiffs should have proved that the amount of stock required was actually subscribed, and not rely upon an examination of the subscription book to determine that fact, without proving the genuineness of the subscriptions.

It is contended, on the part of the plaintiffs, that the last clause of article twenty of the association, relieves them from the necessity of proving a strict compliance with the requirements of the law. The clause in question is as follows: "We do severally and not jointly hereby ratify and confirm all the acts of the Alleghany and Erie Telegraph Company, or the members thereof acting as said company, or done by them jointly, pursuant to the articles, in as full a manner as if we were at all times present and consenting thereto, and do adopt them as if done by ourselves." In reply to this it may be answered that until the complete organization of the company, by the appointment of trustees, they act individually and not as a company. Until such organization each member or subscriber acts for himself. The authority intended to be conferred by the clause in question, is not yet vested. The company must meet, or at least be notified of the time and place of the meeting, at which trustees are to be chosen. Neither of these acts has been done. The meeting was therefore irregular, and the defendant who has done no act ratifying or confirming the proceedings, and has not waived any of his rights, is not bound by the proceedings.

The plaintiffs can not claim that the stockholders are partners; for that would be against the allegations in their pleadings, and if made and allowed, would defeat their recovery upon another principle.

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The judgment of the county court, reversing the judgment of the justice, must therefore be affirmed.

[ORLEANS GENERAL TERM, February 9, 1852. *Taggart, Marvin and Hoyt*, Justices.]

Assignee *Lessee*

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Where a person takes an assignment of a lease he enters into the place of the lessee and takes the premises subject to the accruing rent. This is the legal effect of the written contract; and any proof to show that the lessee agreed to pay the rent which should thereafter become due, would contradict the written contract. Therefore parol evidence for that purpose is inadmissible.

In May, 1847, an agreement was made between one Perry and the defendant, by which Perry was to sell a farm then in Porter's possession to Porter, for \$1000, and Porter was to purchase the farm, provided a certain mortgage upon it should be paid. It was also further provided in the agreement, that Porter should hold possession of the farm as tenant, at the yearly rent of \$70 from the first day of April previous, until the mortgage should be discharged, and then Perry was to convey. In January, 1850, the defendant, reciting that it was in consideration of \$300 to him in hand paid by the plaintiff, the receipt of which was acknowledged, transferred, assigned and set over to the plaintiff all his right, title and interest in and to the instrument, (the contract and lease) and authorized the plaintiff, in his name or otherwise, to take legal measures for the enforcement of the contract and the enjoyment of the assigned premises. The plaintiff entered into possession of the premises, and in May thereafter was compelled to pay to Perry \$70 for the year's rent due April 1, 1850.

The action was brought to recover from the defendant this \$70. The plaintiff offered to prove that some time previous to the assignment to him, it was virtually agreed that the defendant, in consideration of \$300, should assign the contract and

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lease to the plaintiff, and should pay the rent to become due in April, and that the written assignment was made in part performance of this agreement; that he paid to the defendant \$225, and a note for \$75, made by one H. Graves, payable the first day of April. He also offered to prove that in consideration of the note, and the acceptance of the assignment, the defendant agreed verbally to pay the rent to become due in April; that the note was paid at maturity; that the defendant did not pay the rent, and that the plaintiff was compelled to, and did, pay it. The offered evidence being objected to, was rejected, and the plaintiff excepted. He then offered to prove that when he paid the rent to Perry he took an assignment from Perry of the amount and claim for rent, against the defendant. This was rejected and the plaintiff excepted. The plaintiff was nonsuited, and he excepted; and judgment being perfected, he appealed to the general term.

F. J. Fithian, for the plaintiff.

L. F. Bowen, for the defendant.

By the Court, MARVIN, J. The consideration clause in the assignment of the lease was open to explanation by parol evidence. (*McCrea v. Purmort*, 16 Wend. 460. *Adams v. Hill*, 2 Denio, 306. *Cowen & Hill's Notes*, 1441.) But do the questions raised in the case turn upon the rule in relation to explaining or contradicting the consideration clause? Would not the evidence offered have contradicted the contract between the parties? The obligations which the law, under the contract, imposed upon the parties, constitute a part of the contract. Whatever is to be legally implied from a contract, is a part of it. The defendant was lessee of Perry; a year's rent was to become due in April, and in January previous he assigned and set over to the plaintiff all his right, title and interest in and to the lease. The plaintiff accepted the assignment and entered into possession. As between the plaintiff and defendant upon whom did the law impose the obligation to pay the rent when it became due in

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April? The decision in this case depends upon the determination of this question.

If the plaintiff, by accepting the assignment of the lease and entering into possession, became bound, as to the defendant, to pay the rent when due, then any evidence to show that the defendant agreed to pay it, would contradict the contract—that is, the legal effect of the contract. I am not aware that this question has been decided by our courts.

A lessor may resort to his lessee upon his covenants in the lease, for the rent, or to the assignee, upon the privity of estate. (*Comyn, L. and T.* 270.) But suppose the lessor collects the rent of the lessee, may he collect the amount he has been compelled to pay, from his assignee? or, if the lessor collects the rent of the assignee, has the latter any claim upon the lessee for a portion of the rent so paid?

In my opinion when the assignee accepts the assignment of a lease prior to the rent becoming due, he takes it *cum onere*—subject to the payment of the rent which shall thereafter become due, and to the performance of the covenants running with the land, which, by the terms of the lease, the lessee was bound to perform. He must pay the whole rent when it becomes due, and he can not collect a portion of it from the lessee his assignor. The rent, as between them, in the absence of any special agreement, can not be apportioned. The assignee having accepted the assignment and entered, impliedly undertakes to pay the rent and save the lessee harmless. If he fails to pay, the breach occurs while he is tenant, and the lessee is in danger by reason of his covenant broken.

In the present case the defendant assigned to the plaintiff his right, title and interest in the lease: that right was to enjoy the premises upon certain terms, viz. “at the yearly rent of \$70,” payable in April of each year; and when the plaintiff accepted the assignment he entered into the place of the defendant and took the premises subject to the accruing rent. This was the legal effect of the written contract; and any evidence to show that the defendant was to pay the rent becoming due in April,

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would contradict the written contract, and parol evidence for this purpose was not admissible.

In *Bennett v. Lynch*, (5 B. & C. 589,) the ^{lessor} had assigned the lease. Certain covenants running with the land were broken while the assignee was in possession, and the lessor, for these breaches recovered damages of the lessee, who then sued his assignee in an action on the case founded upon the duty or obligation of the assignee to perform the covenants and save the lessor harmless. The action was sustained. All the judges delivered opinions. They held that it was the duty of the assignee to pay the rent and perform the covenants in the lease.

Adams v. Hull, (2 Denio, 306,) is not in point. The decision was put expressly upon the ground that the evidence offered went only to vary or contradict the consideration clause of the assignment. In the present case the evidence offered would have contradicted an essential part of the contract, which imposed obligations upon one of the contracting parties. The evidence was properly rejected, and the judgment should be affirmed.

[ERIE GENERAL TERM, April 26, 1852. *Taggart, Marvin, Hoyt and Mullett*, Justices.]

A. N. RODGERS vs. E. RODGERS and JONES.

In an action by the reversioner, against tenant for life and another, to recover damages for injuries to the inheritance and reversionary interest of the plaintiff, the complaint may state a cause of action for wrongfully cutting, removing, and converting wood, and also a cause of action for drawing off the wood which *had been cut*, and converting it.

A cause of action for cutting and removing timber, and one for removing fire wood already cut, and converting it, followed by averments of injury to the inheritance and reversionary interest of the plaintiff, may be united, under the code, if they affect all the parties to the action. But if either cause of action is against only one of the defendants, it is not proper to unite it with the cause of action against both.

A case, the main and leading object of which is to obtain an injunction to

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restrain future waste, is one of purely equitable cognizance, and as incidental to this jurisdiction, the court, when waste has been committed, will, to prevent a multiplicity of suits, direct an account and satisfaction for past injuries.

When the statement of facts constituting a cause or causes of action will support either of two actions, and it is doubtful which the pleader intended, the demand for judgment may be consulted, with a view of ascertaining which action was intended.

The supreme court has the same jurisdiction which the court of chancery formerly possessed, to restrain waste, upon a bill filed, stating the facts.

The plaintiff may show in his complaint the acts of waste begun, and those threatened, and in a proper case he may have an injunction to restrain the tenant from completing or continuing the waste, or from taking any steps to effect the waste threatened.

The court must be satisfied that the acts of waste will be committed if it does not interfere; and, for this purpose, the complaint may show that the party has actually commenced waste, or that he has threatened to commit it. The injunction may be granted against any one who colludes with the tenant to commit waste.

DEMURRER to complaint. The complaint alledged that the plaintiff was the owner in fee of a farm of 110 acres; that the fee, title, and inheritance were, have been and are in the plaintiff, subject to the life estate of Ebenezer Rodgers; to whom, in September, 1845, he leased and demised the premises for and during the natural life of E. Rodgers; that E. Rodgers had been from that time and still was in possession under the lease. That there were about 23 acres of timber land valuable and necessary for the use of the farm; and that the reversion, inheritance and fee therein would be greatly damaged, injured and impaired if the timber was wasted, injured, or destroyed, more than was necessary for the enjoyment of the life estate. It was alledged that E. Rodgers had by a written agreement or lease, let the cultivating of the premises, or certain portions, to the defendant Jones who resided upon the premises with E. Rodgers, receiving some portion of the products for cultivating the farm. That the contract between E. Rodgers and Jones was to continue during the life of E. Rodgers. It was then further alledged that E. Rodgers had willfully, knowingly and intentionally, and designing to injure the inheritance, committed waste of the wood and timber; that in December last and at divers other times,

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prior to May last, he had been committing waste of the wood and timber by causing large quantities, to wit, 130 growing trees to be cut down and cut into fire wood and taken from the premises, and converted the same &c.; by reason whereof the inheritance of the plaintiff had been greatly injured. The plaintiff then *further showed* that the defendants were combining together to commit waste of the wood and timber, and that they had during the months of October and November, knowingly and willfully, and with design to injure the inheritance, committed waste of the wood and timber. He specified the cutting down of timber and cutting it into fire wood and removing the wood from the premises and converting it, &c. as the acts of waste, whereby the plaintiff was injured in his inheritance by reason of the said joint acts of the defendants. It was then further alledged and charged that the defendants, with intent to injure the inheritance of the plaintiff, committed other waste of the wood and timber; that they had drawn off from the premises fire wood, cut from the timber being upon and growing on the premises, in large quantities, to wit, ten cords, of the value of \$25, and converted the same to their own use for other purposes than consumption upon the premises; whereby the inheritance of the plaintiff had been greatly injured, &c. and he had sustained damage in his inheritance by reason of the said joint acts of the defendants. It was then alledged that the defendants were willfully and designedly continuing to commit waste, and were taking, and causing to be taken from the premises, large quantities of wood and timber, and disposing of the same for their own use &c.; and that they threatened to continue to commit more waste of wood and timber, and would continue to do so unless restrained by order of the court; that by means of the several grievances the plaintiff had been greatly injured in his reversionary estate and inheritance, and had sustained damages by reason of the continued acts of the defendants, to the amount of \$100, &c. The plaintiff prayed that the defendants might be perpetually restrained from cutting, carrying away, or disposing of any of the wood and timber, and from committing waste, and that they might be adjudged to pay the plaintiff the damages

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sustained by reason of the wrongful acts committed *by them together*, by, through, and under the sanction of each other as aforesaid, together with costs, &c.

The defendant E. Rodgers demurred to the statement of the cause of action relating to drawing from the premises fire wood, cut from the timber, upon the ground that the complaint did not state facts sufficient to constitute a cause of action.

The defendant Jones demurred on the grounds, first, that several causes of action were improperly united, specifying particularly the reasons; second, that the complaint did not contain facts sufficient to constitute a cause of action; that it did not contain facts which made a case for an injunction against Jones, and he specified various reasons and grounds.

H. S. Goff, for the plaintiff.

W. K. McAllister, for the defendant.

By the Court, MARVIN, J. What is the action the pleader has attempted to state in this complaint? What are the causes or cause of action? How many causes of action are stated, one or more? Facts, conclusions of law, and reliefs prayed, are so jumbled together that it is difficult to answer these questions. It was called, upon the argument, an action of waste; and it was said that the object of the plaintiff is, to obtain damages for the *combined* acts of the defendants, and a perpetual injunction to restrain them from committing further waste. The plaintiff's counsel referred us to section 450 of the code, abolishing the action of waste, and substituting the remedies given by the code for the wrongs heretofore remediable by action of waste.

Does the plaintiff intend and expect to recover "the place wasted and treble the damages found by the jury," (2 R. S. 335, § 10,) or "forfeiture of the estate of the party offending, and eviction from the premises?" (*Code*, § 450.) I presume not. He has not demanded any such relief. The relief he demands is an injunction, and damages by reason of the wrongful acts committed by the defendants together.

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The case then is to be regarded not strictly as an action of waste, or rather as the action allowed by section 450 of the code as a substitute. Is it to be regarded as the old action on the case in the nature of waste, which lay for the same acts or omissions as the writ of waste, when the acts or omissions were injurious to the reversion? (*Arch. L. & T.* 201.) In the action of waste the plaintiff was obliged to set out his title; but in case it was not necessary. (2 *Saund.* 252, notes c. & d. *Arch. L. & T.* 204, and forms. *Comyn's L. & T.* 293. 2 *Chit. Pl.* 784, declaration in case.) Case for injury to the reversion, and trover, when the property, by severance from the realty, had become chattels, could be united in the same declaration. (*Chit. Pl. supra.*)

In the present case, if we regard this simply as an action to recover damages for injuries to property, (*Code*, § 167, class 3d,) I see no objection to stating in the complaint the cause of action for wrongfully cutting, removing and converting the wood; and also the cause of action for drawing off the wood which *had been cut*, and converting it. The one cause of action would have been in case, in the nature of waste, and the other in trover for removing the wood which had been cut and thus became personal property. (*Schermerhorn v. Buel*, 4 *Denio*, 422.) The causes of action would "all arise out of" "injuries with or without force to property." (*Code*, § 167.) In this view of the complaint, it would be important to inquire how many causes of action are set forth, and we should find three distinct statements of causes of action. The first against E. Rodgers alone, for cutting and removing the timber; the second against both defendants for cutting and removing, &c., and the third against both defendants for removing fire wood already cut, and converting it. Each of the statements is followed by the consequence, viz. injury to the inheritance and reversionary interest of the plaintiff, &c.

These causes of action can be united, under the code, if they affect all the parties to the action; (§ 167;) but in this case the first cause stated is against only one of the defendants, and it was not proper to unite this with the causes of action against both.

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The defendants' counsel has evidently regarded the complaint as stating several causes of action, the recovery of damages being the main object; and the manner employed in framing the complaint and stating the injuries, gives countenance to this view. The pleader has resorted, in stating the wrongs committed, mainly to the forms used in an action on the case in the nature of waste. (*See forms in Chit. Pl.*) And in the view taken by the defendants' counsel, he supposes that section 167 of the code, relating to the union of several causes of action in the complaint, is controlling. After a careful consideration of the complaint I have come to the conclusion that this is not the proper view to take of it. There are many actions not embraced in section 167, and to which that section has no application. Upon considering the entire complaint, I think the pleader intended to state a case, the main and leading object of which was to obtain an injunction to restrain future waste. This would be an action of purely equitable cognizance, and as incidental to this jurisdiction the court, where waste has been committed, will, to prevent a multiplicity of suits, direct an account and satisfaction for past injuries. (*Arch. L. § T. 207. 2 Story's Eq. §§ 917, 919. 1 Id. 515, 516. Cooper's Eq. Pl. 150.*)

The pleader, after stating the several wrongful acts of the defendants, the cutting and removing the timber, puts forth prominently the threats of the defendants to "commit more waste," and alleges that they will do so unless restrained. The prayer is for an injunction, and for damages sustained by reason of the wrongful acts committed by the defendants *together*.

When the statement of facts constituting a cause, or causes of action, will support either of two actions, and it is doubtful which the pleader intended, the demand for judgment may be consulted with a view of ascertaining the action intended. (*Spaulding v. Spaulding, 3 How. Pr. R. 297. Daws v. Green, Id. 377.*)

By section 69 of the code, the distinction between actions at law and suits in equity, and the forms of such actions and suits, are abolished, and it is declared there shall be but one form of action. The form is not prescribed, and we must look elsewhere

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for the rules of pleading. The great and leading rule is, that the complaint shall contain a plain and concise statement of the facts constituting the cause of action; and it is undoubtedly true that the great test in determining the character of the action, is to look at the statement of facts. If these facts, however alike, indicate either of two or more actions, then we may look to the relief demanded, and that may settle the doubt. And if several causes of action are united we may apply the same rules.

Courts of equity had jurisdiction to restrain waste, upon a bill filed, stating the facts. The complainant might show in his bill, and may now show in his complaint, the acts of waste begun, and those threatened, and in a proper case, he may have an injunction to restrain the tenant from completing or continuing the waste, or from taking any steps to effect the waste threatened. The court must be satisfied that the acts of waste will be committed if it does not interfere, and, for this purpose, the complaint may show that the party has actually commenced waste, or that he has threatened to commit it. (*Arch. L. & T.* 206. *Comyn's L. & T.* 485.)

The injunction may be awarded against Jones in this case. It may be granted against any one who colludes with the tenant to commit waste. (10 *Vesey*, 290.) And to prevent irreparable injury it may be granted against a trespasser. (2 *Story's Eq.* 928, 929, and cases cited. *Livingston v. Livingston*, 6 *John. Ch.* 497. 1 *Paige*, 97.) And an account will be ordered, to save the plaintiff the necessity of going to law to obtain his damages. (*Story's Eq.* 929. 18 *Ves.* 184.) The court has as ample jurisdiction now to decide and dispose of the whole matter as the court of chancery formerly had.

There is no difficulty then in applying the remedy by injunction, and account for damages, to the defendant Jones, who has been let into possession by the tenant Rodgers; even if he was not strictly liable to be proceeded against as the assignee of the tenant Rodgers.

The complaint is very inartificially drawn, but the gravamen of the action is the danger of future waste, to prevent which the

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injunction is demanded. Accounting for past waste is incidental to the jurisdiction to award the injunction. So regarding the complaint it states but one cause of action. All the facts are stated as the ground upon which the plaintiff rests his claim to an injunction. They are quite sufficient. The complaint contains some surplus matter, but that can not be reached by demurrer. There should be judgment for the plaintiff upon the demurrer, with leave to the defendants to answer, &c.

[ERIE GENERAL TERM, April 26, 1852. *Taggart, Marvin, Hoyt and Mullett*, Justices.]

**BUELL and others vs. THE TRUSTEES OF THE VILLAGE OF
LOCKPORT.**

In an action of debt upon a judgment rendered against the village of Lockport, by the president of the village, upon confirming an assessment for laying out a street under the 46th section of its charter, the defendants can not set up as a defense that the proceedings for laying out the street were irregular; or that the street laid out ran across or over the site of a building or buildings, the expense of removing which would exceed \$100.

Such a judgment is final and conclusive against the trustees; and they can not impeach it, except for want of jurisdiction, appearing on the record, or by some matter *dehors*, which can be shown without contradicting it.

After a jury has assessed the damages for removing a building, and for the land, at less than \$100, and judgment has been rendered upon their verdict, the trustees, in an action upon the judgment, can not show by parol, or by the opinions of witnesses, that the expense of removing the building would exceed \$100.

When an assessment for opening a street has been made, and confirmed by the trustees of Lockport, and judgment has been rendered against the trustees, for the amount, by the president of the board, the neglect of the trustees to open the street will not destroy the right of action upon the judgment by the owner of the property taken.

THIS cause was tried before Mr. Justice Hoyt at the Niagara circuit, in February, 1850, and a verdict was rendered for the plaintiffs for \$2082.70. The defendants tendered a bill of ex-

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ceptions, and now moved for a new trial thereon. The action was in debt, and was commenced in 1845, to recover the amount of a judgment rendered by the president of the board of trustees of the village of Lockport, on the 26th day of August, 1839, for damages assessed and awarded to the plaintiffs, occasioned by laying out Saxton-street, in said village, across their lands, amounting to \$1200, with interest from said 26th day of August, 1839, when the assessment was confirmed by the board of trustees and judgment rendered thereon by the president of said board. Section 36 of the act incorporating the village of Lockport, passed March 26, 1829, provides "That the board of trustees may lay out and open any street, alley, road or highway, in any part of said village, and cause any street, alley, road or highway already laid out therein, to be opened, and altered or discontinued when and as often as they shall judge the public good may require the same to be done; but that such street, alley, road or highway shall not be laid out or altered so as to run across or over *the site of any building, the expense of removing which will exceed one hundred dollars, for any one street or object.*" (*Laws of 1839, p. 140.*) Section 43 of the same act also provides, that "if, in the opinion of said board of trustees, the public interest of said village shall require that any street, lane or alley therein, should be altered by widening or altering the course of the same, or that any new street should be laid out and opened in said village, and that the land of any person is necessary to be taken for either of said purposes, including the site of any building or buildings, *the expense of removing which shall not exceed one hundred dollars,* the trustees shall have power to alter, lay out," &c. The section then provides for treating with the owner for the damages to the lands proposed to be taken, and for the issuing a precept to a jury to assess such damages; and then provides that "the verdict of such jury, and the judgment of the president of the board of trustees thereon, and the payment of the sum of money so awarded and adjudged to the owner or owners thereof, or the tender and refusal thereof, shall be conclusive and binding against the said owner or owners." Section 46 provides, that

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in case of non-payment on demand, with interest, or in case where the parties shall be known and named in the precept, if the said board of trustees shall refuse to pay the sum or sums so assessed, with interest from the time of judgment rendered upon said assessment, to the said parties or owners, or either of them entitled to the same, said owner or parties may sue for and recover the same from said board of trustees, together with interest; and the proceedings under the precept and proceedings antecedent thereto, shall be presumptive evidence against the defendants."

H. Gardner, for the plaintiff.

J. L. Curtenius, for the defendants.

By the Court, TAGGART, P. J. The defendants seek to set aside the verdict, on the grounds, 1st. That the proceedings for laying out said street were irregular, and for that reason the plaintiff can not recover the damages assessed by the jury, notwithstanding the confirmation of such assessment by the board of trustees, and the judgment rendered thereon by the president of such board. 2d. That the street so laid out *ran across or over the site of a building or buildings, the expense of removing which would exceed one hundred dollars*; and that it is competent to prove what such expense would have been, notwithstanding the verdict of the jury assessed the damages at less than \$100, not only for removing the building, but for the land, and that such proof may be made by parol or by the opinions of witnesses.

L. The case of *Patchin v. Trustees of Brooklyn*, (2 Wend. 377,) was a proceeding under a statute containing provisions in many respects like the above cited provisions of the charter of the village of Lockport, but with this difference: the precept for a jury was issued by one of the judges of the court of common pleas, and was returnable before such court, and the question of amount of such damages tried in such court before the jury, summoned by virtue of such precept. On the return of

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the venire in *Patchin v. Trustees of Brooklyn*, it was objected that the proceedings of the trustees were irregular, but the objection was overruled. The supreme court say, on this subject, at page 383, "In this the court was right; they had no control over the proceedings of the trustees; they can only be reviewed in this court, upon certiorari, precisely as we now review the assessments made by the common pleas."

The same doctrine is reasserted in the same case in the court for the correction of errors. (8 *Wend.* 60.) The chancellor, in giving an opinion, says: "If these proceedings were void, the remedy of Patchin was to prosecute for the trespass, or to apply for an injunction to restrain them from pulling down his house, &c. and if they were voidable merely, they should have been corrected by certiorari directed to the trustees." And in a case between the same parties, (13 *Wend.* 664,) the same doctrine is reasserted.

So in the case of *Stafford v. Mayor of Albany*, (1 *John.* 1,) which was an action to recover the amount assessed to the plaintiff, the court say "the statute makes the assessment conclusive, and the rights of the parties were fixed when this suit was commenced. The subsequent interference of the court in setting aside the inquisition by reason of an alledged irregularity or defect in the precept, was unauthorized and can not affect the validity of the proceeding." (See also same case, 7 *John.* 541, and *Matter of Livingston-street in Brooklyn*, 18 *Wend.* 556.)

By reference to these authorities, it will appear that objections on account of irregularity in the proceedings can not be taken, even on motion to confirm the report. If so, most clearly such objection can not be sustained in an action brought on the report or verdict itself, or upon the judgment rendered upon the confirmation of such report or verdict. This principle is too well settled to be shaken, and all objections on account of mere irregularity, which do not go to the jurisdiction, must be disallowed; the objections on account of the qualification of jurors as well as all others.

II. If it appears from the proceedings, or if the defendants can show in a proper case, and in conformity to legal and estab-

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lished rules of evidence, a want of jurisdiction, the whole proceedings must fall to the ground, including the plaintiff's right of action upon the judgment.

In *Starr v. Trustees of Rochester*, (6 Wend. 566,) in widening a street, part of a building called the Globe Building was taken. The owners' damages were assessed by a jury at \$500, and the owners appealed from the assessment. Commissioners were subsequently appointed, who assessed the damages at \$800, on which last assessment the president rendered judgment. The damages so assessed were apportioned upon the owners of the property benefited by the widening of such street, several of whom sued out a writ of certiorari. A return having been made to the writ, a motion was made on the part of the relators for an additional return, and a cross motion on the part of the defendants to quash the writ. The supreme court, in giving their opinion in that case, say that "if the trustees had been sued for taking property, they would have been bound to state that the expense of removing the building would not exceed one hundred dollars; that is a fact necessary to give jurisdiction in a case where a building is to be removed."

So in case of *Cuyler v. Trustees of Rochester*, which was an action of debt brought to recover the amount of damages or judgment above mentioned in the case of *Starr v. Trustees of Rochester*. The defendants, in their plea, averred that "there was erected and standing a building on the ground which would be taken, the expense of removing which would and did exceed the sum of one hundred dollars." The plea admitting that the owners of the building waived any objection to the alteration of the street. The court cite the above case of *Starr v. Trustees of Rochester*, and say, "on which occasion the chief justice considered this provision of the act, and gave, in my judgment, the true exposition of it. He held that the consent of the owners did not give jurisdiction to the trustees, as all corporators had also an interest in the question, being liable to pay the assessment or expense, and the prohibition in the cases where the expense of removing the building exceeded one hundred dollars, was as well for their benefit as the benefit of the owners of the building. It

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was intimated in that opinion, that if the owners had stipulated to remove the building for \$100, jurisdiction would have been given. This may be so, but in case of failure to perform such stipulation, by the owners, I apprehend the loss would fall personally on the trustees; for in no event is the corporation to be subjected to an expense beyond one hundred dollars."

And again; "If it had been the intention or expectation of either party, that the expense of removing the building should be limited to one hundred dollars, it would have been very easy and natural to have said so. Be this as it may, as the fact of the limitation of the expense to one hundred dollars, and not the consent of the owner, is what gives jurisdiction, if at all, it should have been made distinctly and unequivocally to appear, and should not have been left to conjecture. For ought that appears before us, if the jury in the assessment of the damages and expenses, had allowed to the owners the whole expense of the removal of the building, we could not say it was erroneous, as we think the better opinion is that the owners, by the consent given, did not intend, nor did it necessarily carry along with it, a limitation of the expense."

It is not decided in either of the above cases, nor is any intimation given as to the kind of evidence which is admissible to prove the amount of the expense of removal, but in the case of *Starr v. Trustees of Rochester*, it distinctly appears that the damages were assessed in pursuance of the provisions of the charter at \$800. And in the case of *Cuyler v. Trustees of Rochester*, it is alledged in the plea, and admitted by the demurrer, that the expense would exceed \$100. The question of the admission of witnesses on the trial in the latter case, or of proving by affidavits or otherwise the estimated amount of the expense in the former, did not arise, and is not passed upon in any way. I have no doubt the questions decided in these cases are correctly decided, but they are not authority, beyond the decisions actually made.

In the case now under consideration the damages in one case are appraised, including the value of the land, at \$55, and the proof in the other case, where a street was over the site of the building, was \$15 or \$20, falling far short of \$100 in the aggregate.

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dict and judgment thereon final and conclusive, defendants? They instituted the proceeding to lay the street, issued the precept for the jury to assess the damages, affirmed the verdict of the jury and rendered a judgment thereon. It is true the statute makes this judgment presumptive evidence only; but I apprehend this provision does not limit the effect of the record. It is presumptive evidence of the facts contained in it, as against the defendants, and they have no right to impeach it except for want of jurisdiction appearing in the record, or by some matter dehors, which can be shown without contradicting it.

It is insisted by the plaintiff's counsel in this cause, and I think with great propriety, that the question of the expense of removing the buildings ought not to be tried by the opinion of witnesses; that the question of the legality of the street, and the rights of the parties connected with it, would be in perpetual surprise and uncertainty were that the rule. No owner could safely improve his land taken for the street, nor prosecute for the damages awarded him. No length of time would settle it as a street. The question might arise not only in the action for damages awarded, but upon the collection of assessments for its repairs and improvements; for the making of side and cross-walks; in actions for its obstruction and encroachment, and in a great variety of other ways.

In this case, the proof being allowed, witnesses will swear that the expense of removing the buildings will exceed \$100. Another action is brought by some other owner, and witnesses differ in opinion, and the expense of removing is but \$55, the amount assessed. Hence, in one case we have a street and pay the damages, and in the other we have no street and get rid of the damages. This will not answer; the defendants must be bound by their recorded proceedings. They can not be permitted thus to trifle with their own solemn judgment.

In the case of *Starr v. Trustees of Rochester*, the court say the trustees must answer "whether it was known and perfectly understood by them that the removal of the front wall of the Globe Building would cost more than \$100." It seems by this that the trustees are in the first instance judges of the question

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of jurisdiction. They are to determine as to the amount of expense of removal, and if it exceeds the \$100 they have no jurisdiction. If in their judgment it will not exceed the \$100, they have jurisdiction. If this were otherwise the verdict of the jury is conclusive. They having found the damage to the owner of the wagon shop at \$55, that question is finally settled and fixed. No change can be made except in resisting the confirmation of the verdict, or upon appeal to the court of common pleas.

I am therefore of opinion that there was no error in rejecting the evidence offered, to prove that the expense of removing the building would exceed \$100.

It is not necessary to decide the question whether the fact of a building being on land taken for said street, other than the plaintiff's, is in any event admissible. In the case of *Coles v. Trustees of Williamsburgh*, (10 *Wend.* 659,) the court say, "The plaintiff in error can not avail himself of any irregularity which may have happened in the appraisement of the value of the lands of others in which he had no interest, inasmuch as the assessment of the lands of each owner is separate and distinct, the one in no way dependent upon another. It is not for him to urge such objection." This was upon a certiorari to review the proceedings of the trustees of the village of Williamsburgh.

I am inclined to think, however, that a jurisdictional question goes to the whole assessment. If there is a want of jurisdiction as to any one lot, the whole street must be given up.

The remaining question, whether this action can be sustained in any event, is fully settled by the case of *Hawkins v. Trustees of Rochester*, (1 *Wend.* 53,) and the above section 46 of the charter, and the decision of the court of appeals in this cause.^(a) And that the neglect to open the street does not destroy the right of action, is settled by the case of *The People v. The President and Trustees of Brooklyn*, (1 *Wend.* 318,) and *Matter of Anthony-street, New-York*, (20 *Id.* 618.)

I think a new trial should be denied, with costs.

[ERIE GENERAL TERM, April 26, 1852. *Taggart, Mullett, Marvin and Hoyt, Justices.*]

(a) See 3 *Const.* 197.

McALLISTER and others, commissioners of highways of the town of Gaines, vs. THE ALBION PLANK ROAD COMPANY.

In what cases the location of a toll-gate, erected upon a plank road, will be changed, upon application to the county court, by the commissioners of highways, on the ground of such location being unjust to the public interest, by reason of the proximity of diverging roads.

To locate toll-gates, upon a plank road, in such a manner as to compel persons who have traveled several miles on diverging roads to pay half toll for the privilege of traveling 252 rods upon the plank road, is unjust to the public interests.

So where a company has, in legal effect, constructed a plank road the distance of 252 rods, and exacts the legal toll for a distance of 400 rods.

There is no propriety or justice in allowing a company to make a plank or turnpike road on a main thoroughfare leading to a large village, for the distance of seven-eighths of a mile, and to collect tolls for that distance of all persons traveling on such thoroughfare; where the place selected for such road is that part of the thoroughfare most contiguous to the village, with which a large number of roads have united and added their travel to the piece of road over which the plank or turnpike road has been constructed.

The application to the county court, to change the location of a toll-gate, must be made by all of the commissioners of highways of the town. But if made by two only, the objection that the third has not joined, must be made before the county court; otherwise the irregularity will be deemed waived, and the objection can not be raised on appeal.

A county court has jurisdiction to entertain an application of that nature, and to make an order changing the location of a toll-gate; notwithstanding the 29th section of the code of 1849.

Where, upon an appeal to the supreme court from the decision of the county court in changing the location of a toll-gate, referees are appointed to hear, try and determine such appeal; who make their report to the supreme court, of the evidence and of their decision thereon, the judgment to be given by the court is a judgment of reversal or affirmance of the order made by the county court, and not of the report of the referees.

The court is not to be controlled by the decision of the county court, or the report of the referees, but may give such judgment as justice and equity shall require.

THE commissioners of highways of the town of Gaines in the county of Orleans, on previous notice to the appellant, made application to the county court of said county, on the first Monday of January, 1851, for an order to alter or change the location of the toll-gate of said appellant, in pursuance of section 37 of the act of 1847 for the incorporation of plank road and turnpike road

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companies. (*Laws of 1847, p. 216.*) That section provides that "The commissioners of any town in which a toll-gate may be located on any such road, or in an adjoining town, whenever they, or a majority of them, shall be of the opinion that *the location of such gate is unjust to the public interest by reason of the proximity of diverging roads*, or for other reasons, may, on at least fifteen days' written notice to the president or secretary of said company, apply to the county court of the county in which such gate is located, for an order to alter or change the location of such gate; the court, on such application, and on hearing the respective parties, and on viewing the premises if the court shall deem such view necessary, shall make such order in the matter as the said court may deem just and proper; and either party may, within fifteen days thereafter, appeal from such order to the supreme court. Such order, unless appealed from, shall be observed by the respective parties and may be enforced by attachment or otherwise as the said court shall direct: and if appealed from, the decision of the supreme court shall be final in the matter. The said county court and supreme court may direct the payment of costs in the premises as shall be deemed just and equitable." The matter was heard before the county court, and on the 8th day of February, 1851, an order was made by such court, directing the appellants to change the location of their toll-gate. The company appealed from such order to the supreme court, and the appeal was perfected on the 19th day of February, 1851. On the 10th day of July, 1851, an act was passed by the legislature amending the act for the incorporation of plank road and turnpike road companies, the first section of which provides, that "Whenever an appeal to the supreme court from an order of the county court made in the case provided by said section 37 shall be brought, pursuant to the provisions of said section, the supreme court, on motion of either party, on due notice, shall appoint three disinterested persons who are in nowise interested in such company or in the question of the location of the toll-gate thereof, and are not residents of any town through or into which such road shall run, or to and from which such road shall be a principal thoroughfare,

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referees to hear, try and determine the said appeal." (*Laws of 1851, p. 919.*) Section 2 provides that such referees shall proceed to view the premises and the location of the gate affected by the order appealed from, and shall proceed to a hearing of the respective parties, in the same manner as is provided by law and the rules and practice of the supreme court on references of civil actions, and shall report their decision to the said supreme court as referees are required to report, together with the evidence taken by them and the grounds of such decision. And the report of such referees may be reviewed by the said court, and judgment given thereon as justice and equity shall require, in view of the law and the facts so presented, and such judgment shall be final and conclusive. Section 3 provides, among other things, that the supreme court shall award judgment for the referees' fees, together with such amount of costs and expenses as shall be deemed reasonable by the said court, to the party succeeding on such appeal; which judgment shall be entered with the order and judgment of the said court, affirming or reversing the order of said county court appealed from. By section 4 the act is applied to appeals brought before the passage thereof, and then pending. (*Id. p. 920.*)

At a special term of this court, held in Erie county on the 25th of August, 1851, three referees were appointed in pursuance of said act, to hear, try and determine said appeal, one of whom being unable to serve, another was at a subsequent special term appointed in his place. The appeal was brought to a hearing before the referees, on the 26th day of November, 1851, and on the 27th day of November they made their report, reversing the order of the said county court.

The proceeding was instituted on the sole ground that the location of such gate was unjust to the public interest, by reason of the proximity of diverging roads; and on that ground alone, the county court ordered its removal. The referees proceeded and viewed the premises and the location of the gate, and then proceeded to a hearing of the respective parties, and stated in their report that the following facts were established before them, viz. That the plank road in question extended

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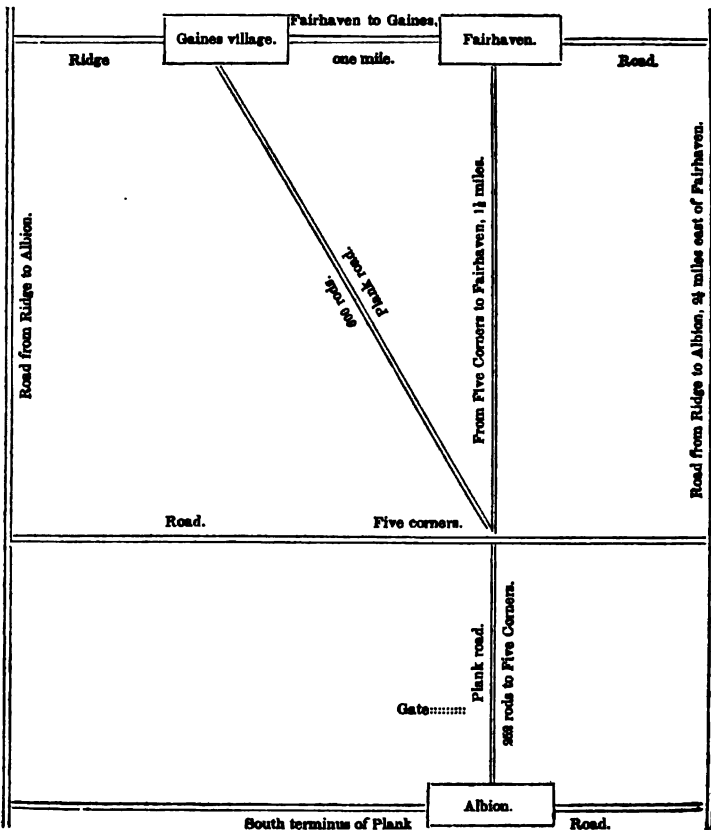
from the village of Albion to a point on the Ridge road in the village of Gaines, for the distance of two and two-thirds miles ; that the toll-gate is located about thirty rods from the south terminus of the road ; that the first diverging road is north of the south terminus of the said road, the distance of two hundred and fifty-two rods, at a place called the five corners, and from which, to the village of Gaines, is six hundred rods. From the five corners, by the diverging road to Fairhaven, on the Ridge road, the distance is one and a half miles, and the same road extends about five miles north to Lake Ontario ; that at the said five corners there is a road crossing said plank road east and west. That the said road from the five corners to Fairhaven, as well as the road from said corners to Gaines, previous to the construction of said plank road, were thoroughfares extensively and about equally traveled by the public, and accommodated a large portion of the northern part of the county of Orleans ; and that both roads, for the whole distance from Albion to the Ridge road, in common dry weather, were good roads, and in bad or wet weather were bad roads ; that the termini of said roads on the ridge were about one mile apart ; that there are several other roads both east and west leading south from the ridge road to the village of Albion, situate in the town of Gaines, and which extended into the northern part of the county ; that the said plank road was built in the summer of 1850, and was completed and inspected on the 5th of August, 1850, at which time the company commenced taking tolls ; that the company had directed the toll-gatherer to receive, and he had received, four cents for double teams and two cents for single teams, passing on the said road to and from Gaines to Albion, and two cents for double teams and one cent for single teams passing on said road to and from said corners to Albion.

The referees then find, upon the foregoing facts and evidence, and decide and determine, that the order and judgment of the county court be reversed ; and the grounds of such decision are, that it appears from viewing said premises, and from the evidence and facts as they appear upon said hearing, that the location of the toll-gate of said company is *not unjust to the*

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public interest by reason of the proximity of diverging roads, or for any other reason; but that on the contrary the location of said gate is such as to subserve the public interests, and that the removal of said gate, as ordered by the said county court, would deprive the company of the means of collecting their reasonable tolls. There were other facts not stated in the report of the referees, which had a bearing upon the decision in this case, and which are sufficiently adverted to in the opinion of the court.(a)

(a) Diagram of the roads referred to in the case:



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N. Davis, jun. for the appellant.

B. L. Bessac, for the respondent.

By the Court, TAGGART, P. J. The referees have, in their examination of this case, arrived at a conclusion which I think is not warranted by the facts. According to their own finding, it appears that the company so located their gate as to secure not only all of the travel on the Gaines road, on which they constructed their plank road, but also on the Fairhaven road, over which was as much travel as on the Gaines road. I do not regard as of any importance, the travel turning south from the east and west road; but to compel those who have traveled from the east on the ridge road, and from the north a distance of from one and a half to six miles, to pay half toll for the privilege of traveling the distance of 252 rods—less than seven-eighths of a mile—is, in my opinion, unjust to the public interests.

The company is authorized to receive toll not exceeding one and a half cents per mile, for any vehicle drawn by two animals, and for every vehicle drawn by one animal, three quarters of a cent a mile. The appellants, for the purpose of establishing an equity, or proving their conduct just and equitable, gravely offer to prove in justification of their usurping the right to control all the travel on roads diverging from their road, that notwithstanding they had the legal power to charge full toll for the whole distance from Gaines to Albion, they actually refrained from charging quite double what they had a right to charge for the distance of 252 rods. I do not concede that the amount of toll which the company *do charge*, is the criterion by which their rights in this case are to be determined. They have the legal right to charge full toll to every traveler who passes through their gate, irrespective of the place where they may have come onto the road, with the single exception of those who live within one mile of the gate, and of those who are exempted from paying toll by statute. (*Mallory v. Austin*, 7 Barb. S. C. Rep. 626. *Stuart v. Rich*, 1 Caines, 182. *The*

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People v. Kingston and Middletown Turnpike Company, 23 Wend. 198.)

It is said that "there are several other roads, both east and west, leading south from the ridge road to the village of Albion, situated within the limits of the town of Gaines, and which extend into the northern part of the county." That there is a road from the ridge to Albion, parallel to the Fairhaven road, a mile and a quarter east of it; also two roads coming from the north to the ridge road between Fairhaven and the east line of the town of Gaines. In answer to this, it is proved that the parallel roads are bad, worse than the Fairhaven road; and the road from Albion to Holley, on the canal, has some bad hills.

Assuming, as the referees have found, that the travel on the two roads was about equal, I think the location of the toll-gate unjust. What propriety or justice is there in allowing a company to make a plank or turnpike road on any main thoroughfare leading to a large village, for the distance of seven-eighths of a mile, and collect toll for that distance of all persons traveling on such thoroughfare? And how much less propriety or justice is there in selecting, as the place for such road, that part of the thoroughfare most contiguous to the village with which a large number of roads have united and added their travel to the piece of road over which the plank road has been constructed?

In the case of *Mallory v. Austin*, above cited, the court say at the conclusion of the opinion, "the counsel for the appellant put some cases of flagrant injustice, that might occur under the law, upon the construction which we feel bound to adopt; as for instance, the location of but a single gate on the road, and that near the city of Utica, and an exaction of the toll for the entire route. We do not think such a case likely to occur; but if it should, we know of no remedy for that or other like cases of injustice, but an application for the removal of the gate, or such an amendment of the act regulating plank roads, as may reach the evil complained of." This case is not to be compared to the hypothetical case above put, in degree, but the principle is the same. The company have, in legal effect, constructed a

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plank road the distance of 252 rods, and exact the legal toll for a distance of 400 rods. But this case is much stronger for the respondents than the referees have found. On the hearing before the county court, ten witnesses testified that the travel on the Fairhaven road, before the construction of the plank road, was double that on the Gaines road; two, that it exceeded the travel on the Gaines road; three, that the travel on the two roads was about equal; and five, that the travel on the Gaines road exceeded that on the Fairhaven road. And I do not know that the evidence before the referees materially varies the question as to the amount of travel on the two roads. It seems to me, therefore, inasmuch as the same evidence was before the referees, that was given in the county court, that they have erred in finding that the travel on the two roads was about equal. But this being a matter of fact, I do not propose to make any decision upon that ground, but base my opinion upon the facts found by the referees.

It is contended that the order of the county court is "unjust to the company in compelling the location of the gate at a point where all travel can shun it. That no person coming to or going from Albion need pass the toll gate at all, if it be changed, yet all must travel the road for one third of the whole distance. Even in visiting the village of Gaines, driving half a mile farther will enable any party to shun the gate." All this may be true. One answer is that it was known to the appellants before they constructed their road. They had no right to anticipate that they would secure all the travel on both roads, and collect tolls therefor. They knew the situation of the roads before they constructed their road. If the situation of the roads or the country was such that the travel would inevitably shun their road, it is pretty strong evidence that the public interest did not require its construction. The frequency of the roads east and west furnishes no sufficient reason for retaining this gate. The public should not be driven a roundabout road a mile or two for the sake of shunning their gate; nor should they be compelled to travel over a worse road. The people on the Fairhaven road have made and improved that, at their own expense, and should not be deprived

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of its benefits, unless they can receive an equivalent therefor. And I think the privilege of traveling over 252 rods of plank road by paying toll therefor is not such an equivalent as they are entitled to.

On the facts found by the referees, I think they came to an erroneous conclusion, and their report should be reversed and the order of the county court should for that reason be affirmed, unless there shall be found some insuperable objection in the proceedings before the county court, or in the conclusiveness of the report of the referees.

It is objected that the county court erred in excluding the evidence of the rate of toll fixed and charged by the appellants to persons coming onto or leaving their road at the diverging road. I think not. The offer was not sufficient. The tolls charged were higher per mile than the statute allows; and besides, the public had no security that such rate of tolls would be continued after a final decision of the question of removal. Nor could any such security be given. The law makes no provision for such a case. It is also contended that the county court had no jurisdiction upon the application, because it was not made in conformity to the statute. The notice was signed and the application made by John J. McAllister and Major T. Lamont, commissioners of highways of the town of Gaines; whereas there are three commissioners of highways for said town. This objection would have been fatal if it had been made before the county court. All of the commissioners should meet or be notified to meet, and when so met or notified, a majority may act. But in this case the county court had jurisdiction of the subject matter. The appellants, by appearing and not objecting to the regularity of the process or proceeding, waived the irregularity and conferred jurisdiction of the person upon the court. This objection can not, therefore, now be sustained. (*Squires v. Broome C. P.* 10 *Wend.* 600.)

It is also contended that the county court had no jurisdiction of the proceeding, or *subject matter*, and no power to make the order appealed from. This is a question of more difficulty of solution. Section 29 of the code of 1849, provides that "All

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statutes now (then) in force comprising or defining the jurisdiction of the county courts, so far as they conflict with such act, are repealed; and those courts shall have no other jurisdiction than that provided by the next section." It is contended on the part of the respondents that it was the intention of the framers of the code to regulate and define the original and general jurisdiction of the courts, and the form and manner of enforcing civil remedies therein by action, and that it was not their intention to interfere with the numerous and important incidental powers conferred upon the old court of common pleas, and transferred to the county courts under the present constitution. Section 471 of the code provides that "Until the legislature shall otherwise provide, this code shall not affect any special statutory remedy not heretofore obtained by action." The statutory remedies referred to were numerous, and many of them were to be sought in the county courts or courts of common pleas alone, and others in that and other courts. I think, too, the above mentioned act amending the act for the incorporation of plank road and turnpike road companies implicitly furnishes a legislative recognition of the jurisdiction in this case.

It seems to me that the counsel for the respondent is right in this construction of this statute, and that the court has jurisdiction of this proceeding.

The only remaining question is, whether this court will interfere, on a simple question of fact, to reverse the decision of the referees. An appeal was given from the county court to the supreme court. The county court decided the matter upon the merits, and in my opinion decided it correctly, but the referees reversed his decision. They are appointed "*to hear, try and determine the said appeal.*" They are to proceed to a hearing in the same manner as is provided by law and the rules and practice of the supreme court on references of civil actions, and *shall report their decision to the said supreme court* as referees are required to report, *together with the evidence taken by them*, and the grounds of their decision. And the report of such referees may be reviewed by the said court and judgment given thereon, *as justice and equity shall require*, in view of the law and the

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facts so presented and such judgment shall be final and conclusive.

The statute does not declare that the report of the referees shall have the same effect as referees' reports in civil actions, but on the contrary thereof the statute expressly provides that judgment is to be *given thereon, as justice and equity shall require*. This court is not therefore to be controlled by the previous decision of the county court, or the report of the referees. The judgment to be given is a judgment of reversal or affirmance of the order made by the county court, and not of the report of the referees.

On the whole case I think the order of the county court should be affirmed.

[ERIE GENERAL TERM, April 26, 1852. *Taggart, Marvin, Hoyt and Mullett, Justices.*]

BILLINGS vs. JANE.

A person to whom a promissory note, payable to order, has been sold and delivered, previous to its becoming due, for a full and valuable consideration, may maintain an action thereon, in his own name, without alledging an indorsement of the note to him.

THE plaintiff declared on a promissory note of which the following is a copy: "For value received I promise to pay to the order of F. U. Fenno one hundred and fifty dollars with interest, by the first day of December next. Dated May 9, 1845." The complaint alledged that F. U. Fenno sold and delivered said note to the plaintiff before it was due, for a full and valuable consideration. The defendant demurred to the complaint, upon the ground that Fenno, to whose order the note was made payable, did not indorse it to the plaintiff, and that the plaintiff could not therefore maintain this action in his own name.

Johnson v. Cayuga and Susquehanna Railroad Company.

H. Sturges, for the plaintiff.

F. U. Fenno, for the defendant.

By the Court, SHANKLAND, J. We are of opinion the demurrer can not be sustained, for the reason that although by the commercial law such paper is negotiable, and negotiated by indorsement only, yet it has been holden, before the code, that the property in the note passes by actual delivery, and that the owner may sue, in the name of the payee, for his own benefit. (10 B. & C. 122. *Chit. on Bills*, 204. 13 *Mass. Rep.* 305.)

The code, by the 111th section, has now made it proper, and indeed necessary, to sue in the name of the actual owner, or real party in interest. Here the plaintiff is the actual owner, and real party in interest, of the note sued on. He purchased it for a valuable consideration, and took the actual delivery of it from the payee and former owner.

Whether the plaintiff is protected from a set-off or other defense which the defendant may have against Fenno, within the protection given to assignees in good faith, by the last clause of section 112, it is not necessary now to decide.

The demurrer is overruled, and judgment ordered for the plaintiff, unless the defendant answers in twenty days, on payment of costs of this demurrer.

[MADISON GENERAL TERM, May 11, 1852. *Mason, Crippen, Shankland and Gray*, Justices.]

JOHNSON vs. THE CAYUGA AND SUSQUEHANNA RAILROAD COMPANY.

A railroad company may properly be sued in a justice's court, by long summons. In cases of corporations, no provision is made by statute for process by warrant, or attachment, or short summons.

Upon an agreement by a railroad company to carry freight for the owner thereof, at so much per ton, it is not liable to refund to the freighter the

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amount paid by him for weighing the freight; in the absence of any evidence of an agreement that the defendants were to weigh the same, or cause it to be done, or to pay for the weighing.

APPEAL from a judgment of the Tioga county court, reversing a justice's judgment in favor of the plaintiff in that court.

Johnson sued the defendant, a railroad company, in a justice's court, in the county of Tioga, by long summons. The defendant appeared by attorney and moved that the suit be dismissed, on the ground that the defendant had not been served with legal process; and alleged that the defendants were a corporation, whose office and chief place of business was in Ithaca, Tompkins county, and not in Tioga county, and that the summons in the suit was not by short summons; which allegations were not denied by the plaintiff; but it was admitted that the defendant's railroad extended into the county of Tioga, and that its business was partly transacted in that county. The motion was denied. The plaintiff then declared for money laid out for the defendant, in paying for weighing plaster, which by contract between the parties the defendant was to pay, and should have paid, and which the plaintiff was compelled to pay. The defendant denied the facts stated in the complaint. Evidence was then introduced to prove that in 1850 the agent of the defendant agreed to transport plaster for the plaintiff, from the top of the hill south of Ithaca to Owego, for one dollar per ton, but the agent, in answer to the plaintiff's inquiry, told him the defendant's scales were out of repair; and in reply to the plaintiff's further inquiry, told him Seymour's scales were the handiest to weigh at. The plaintiff drew the plaster in wagons from the lake landing to the top of the hill, and on the way there got it weighed at Seymour's, who charged it to the plaintiff. The defendant's agent at the hill station received the plaster, and not knowing it had been weighed, estimated its weight, and charged for it at his estimate; but on the final settlement corrected the estimate by the bill of weight produced from Seymour's. It appeared the defendant had been in the habit of carrying plaster over the road for the plaintiff and others for many years, and of weighing it for the purpose of making their charges, but had never made any sepa-

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rate charge for such weighing. But during the year 1850 they had carried freight by estimate, in consequence of the scales having broken down. The jury found a verdict for the plaintiff for the expense of weighing at Seymour's scales, \$11,62, on which judgment was rendered, and which judgment the county court reversed.

John J. Taylor, for the appellant.

J. M. and G. W. Parker, for the respondent.

By the Court, SHANKLAND, J. Two questions are discussed in the points submitted; first, could the defendant be sued by long summons? second, was there any evidence to sustain the verdict of the jury?

On the first question I am of opinion that the defendant was properly sued by long summons. The constitution of 1846 provides that corporations may be sued in like cases as natural persons, before justices; and § 45 of the act amending the judiciary act of 1847, provides the mode of service of process in such cases, and directs it to be served on the presiding officer, secretary, cashier, treasurer, or any director or trustee thereof. In the absence of statutory regulations to the contrary, the ordinary long summons is the proper and legitimate process of a justice's court. In cases of corporations, no provision is made for process by warrant, or attachment, or short summons. The provisions made by statute for process by warrant, attachment and short summons, are for the cases of natural persons sued as defendants, and not corporations. The words "resident" and "non-resident," used in the statute, in respect of process by warrant and short summons, seem inappropriate when applied to corporations.

On the second point I am of opinion that there is no evidence of any agreement, express or implied, that the defendants were to weigh the plaster or cause it to be done, or to pay for it at Seymour's. Although the defendants had done it, in previous years, for their own convenience, yet they had not done so after the scales were broken. Nor could there be an implication of

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an agreement to do it, from a previous habit, when it arose from motives of mere convenience to themselves, in order to regulate their own charges. Had the defendants weighed this plaster, the plaintiff would not have been bound by it, when he came to pay for the transportation; nor was the weighing of it, by the company, a condition precedent to the right of recovery.

The plaster in this case was weighed by the plaintiff's own request, and at his own suggestion, and before it was delivered to the defendants to be carried; and without the knowledge of the defendants, when they received it, that it had been weighed.

As there was not any evidence tending to prove a liability on the part of the defendants to pay for weighing the plaster, the judgment was properly reversed.

Judgment of county court affirmed.

[MADISON GENERAL TERM, May 11, 1852. *Mason, Crippen, Shankland and Gray, Justices.*]

MASTERS vs. THE MADISON COUNTY MUTUAL INSURANCE COMPANY.

A contract entered into between a party insured and another, by which the former agrees to sell and convey to the latter the property insured, at a future day, on the purchaser's paying a part of the purchase money and securing the balance by a bond and mortgage upon the property, is not—in the absence of any evidence showing that the purchaser has complied with the conditions of the agreement, on his part—an *alienation* of the property insured, within the meaning of a section of the charter of the insurance company, declaring that when any property insured with the company shall be *aliened by sale or otherwise*, the policy shall be void.

The term *alienate* has a technical legal meaning; and any transfer of real estate, short of a conveyance of the title, is not an alienation of the estate. The surveyor and agent of an insurance company, on being applied to, for an insurance upon the plaintiff's mill, went to see the property, and made a survey thereof, the plaintiff not accompanying him, but leaving him to transact the business, and do whatever was necessary. The agent then made out the application, for the plaintiff to sign; using the printed blank furnished to agents for that purpose. He was informed at the time, by the

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plaintiff's son, that there was a mortgage on the premises, which was a lien thereon. But the application made no mention of any incumbrance: *Held*, that the notice given to the agent, of the prior incumbrance, was sufficient notice to the company; and that the omission to set forth the mortgage in the application, was not a breach of warranty, or a concealment of important matters affecting the risk; notwithstanding the application, by a memorandum in the margin, required the applicant to state whether the property was incumbered, by what, and to what amount, and if not, to say so; and although the by-laws of the company made the person taking the survey the agent of the applicant.

Held also, that under these circumstances, the plaintiff could not be prevented from recovering against the company, upon the policy, by the omission to mention, in the application, the fact that there were other buildings standing within ten rods of the property insured, in answer to an interrogatory upon the margin of the application.

The fact that an applicant for an insurance merely mentions the nearest buildings—without professing to do more, or to make any further statement—does not amount to a warranty that there are no other buildings within the given distance of ten rods.

If there are other buildings, it amounts to the withholding of information called for by the interrogatory; and then the question arises whether it is material to the risk. If the risk is not increased by the other buildings, then the withholding of the information is immaterial. This is a question of fact, proper to be submitted to the jury.

Although the by-laws of an insurance company make the person taking a survey in its behalf, the agent of the *applicant*, still he is the agent of the company also, and it is bound by his acts.

THIS action was brought on a policy of insurance, dated the 8th day of June, 1848, by which the defendants insured the plaintiff for five years, against loss or damage by fire, to the amount of \$2000, on "her grist mill in the town of Madison, and shed adjoining, and tools and machinery therein." On the 19th day of July, 1850, the property was destroyed by fire. The policy contained the following clause: "And it is also agreed that this policy is made and accepted subject to, and in reference to the terms and conditions of the act of incorporation and by-laws of the said company, which are to be used and resorted to, to explain or ascertain the rights and obligations of the parties hereto, in all cases not herein otherwise provided for." The 7th section of the act of incorporation of said company, enacts as follows: "Where any property insured with

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this corporation shall be alienated by sale, or otherwise, the policy shall thereupon be void, and be surrendered to the directors of the said company to be cancelled." The 11th section of the by-laws of the company provides, that "whenever any member of this company shall alienate or sell any house or building insured, he may surrender his policy to the secretary, with a request, signed by him, to have the same cancelled, and the secretary shall enter the same on record as cancelled." On the 15th day of March, 1850, the plaintiff entered into a written article of agreement with one Freedom Hicks, by which she contracted to sell and convey the said mill and mill privilege, and the lands belonging to the same, to the said Hicks, and to give him a good deed of said premises on the first day of September, then next. Hicks, on his part, agreed to pay the plaintiff the sum of \$3,250 therefor, of which sum \$500 was to be paid on the said first day of September, with interest on the whole sum up to that time, and then to pay the residue of said purchase money in annual installments of \$200 each, with annual interest, and to secure such annual payments by a bond and mortgage on said premises.

It was agreed that Hicks should take and have immediate possession of said property, and he agreed to keep the mill insured in some good, safe mutual insurance company, for as large an amount as such company would insure the same. Hicks also agreed, in case he failed to make any of the payments as required by the terms of said agreement, to yield up the possession of said premises to the plaintiff, and to forfeit all rights under said contract. The policy also referred to the application of the plaintiff as follows: "Reference being had to the application of the insured, numbered 3081, for a more particular description, and forming a part of this policy."

The application contained the premium note of the plaintiff for \$320, in the usual form, and then proceeded as follows: "Application of Ann Masters, of Hamilton, in the county of Madison, for insurance against fire, by the Madison County Mutual Insurance Company, for the sum of \$2000, on her grist mill and shed adjoining, and tools and machinery therein. Rate

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of premium, 16 per cent, five per cent paid." The application required the plaintiff to state how the mill was "bounded, and the distance from other buildings, if less than ten rods, and for what purpose occupied, and by whom." To this the plaintiff answered as follows: "occupied by a tenant, shed about 20—50 west of mill, small room 12—14 south of mill." Also the application required the plaintiff to state the incumbrances, in the following form: "whether incumbered, by what, and to what amount; if not, say so." To this no answer was given: it was left a blank in the application. The application was signed by the plaintiff, and witnessed by J. M. Gray, agent, and without date.

It appeared that John Lucas, a former owner of said premises, on the 20th of November, 1840, gave a mortgage thereon to Carlton Rice, for \$1500, which was recorded in the clerk's office of Madison county, on the 13th day of December, 1841. That in June, 1848, there was due on this mortgage \$300 or \$400, and about a year previous to the trial had been paid off in full. It also appeared that the plaintiff held a mortgage given by Carlton Rice, on the 17th day of April, 1848, to her for \$9000, on a farm in the town of Lebanon, worth double that amount, one of the conditions of which mortgage was to indemnify the plaintiff against the Lucas mortgage on the mill and premises in question. The mill was shown to be worth from two to three thousand dollars at the time it was burnt, and that the title was in the plaintiff at that time. No question was made as to the giving the requisite notice of the destruction of the property by fire, and furnishing the company with the necessary preliminary proofs thereof. It appeared that Jerome M. Gray filled out the application for the plaintiff for the insurance; that he was the agent for the defendant at that time, and had been for about the period of one year previous thereto. The plaintiff resided in Hamilton, about 6 or 7 miles from the premises in question, and was about 70 years of age. Gray examined the premises before making out the application, and the plaintiff did not go with him. It also appeared that there was a house and barn on said premises, within ten rods of the mill, at

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the time the application was made by the plaintiff for her insurance. The house was 135 feet, and the barn 120 feet from the mill. The house stood across the canal from the mill, which was 70 feet wide, and the barn stood down the stream from the mill, on the tow-path of the canal. The agent, Gray, testified that he saw the house and barn when he took the survey of the mill, previous to making out the application, but did not mention them therein, on account of the abundant supply of water there. It appeared that the plaintiff's son was present when the agent made out the application; that he then told the agent all the particulars about the Lucas mortgage on the premises. This evidence was objected to by the defendants' counsel, and rejected by his honor the, justice before whom the cause was tried, without a jury.

The court ordered a judgment in favor of the plaintiff for the sum of \$2,147,86 damages.

By the Court, CRIPPEN, J. The first point raised by the defendant is, that the contract for the sale of the premises insured, and the possession and occupation thereof, by the purchaser, was such an *alienation* of the property as rendered the policy void within the meaning of the 7th section of the act incorporating said company.

It is undoubtedly true that the vendee acquired an equitable interest in said premises by his contract of purchase, and might have compelled a specific performance thereof on the part of the plaintiff, by a full compliance on his part. This action was commenced in December, 1850, and there is no evidence in the case showing that the purchaser had complied with his agreement, by making the payment which fell due on the first day of September, 1850, to the plaintiff; or that he had otherwise complied with the conditions of the contract, which he had agreed to perform on that day. The plaintiff on the trial proved her title to the premises, and by the terms of the contract of sale it was expressly agreed by the purchaser that if he failed to make any of the payments, he was to yield up the possession

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of the premises to the plaintiff, and forfeit all his rights under said contract.

The language of the seventh section of the act of incorporation provides that "When any property insured with this corporation shall be *aliened*, by sale or otherwise, the policy shall thereupon be void, and be surrendered to the directors of said company to be cancelled." This is the precise language employed in the 7th section of chapter 41 of the Laws of 1836, entitled an act to incorporate the Jefferson County Mutual Insurance Company. (*Session Laws of 1836, p. 44.*) This has been styled and followed as the pattern act for the incorporation of mutual insurance companies, and as it appears, was literally followed in the act incorporating the defendants, and also in another act incorporating the Mutual Insurance Company of the city and county of Albany.

In the case of *Conover v. The Mutual Insurance Company of Albany*, (3 *Denio*, 254,) the supreme court held that the alienation spoken of in the statute, was an absolute transfer of the title to the property. This is the language of the court, delivered by Chief Justice Bronson. It was made a point in that case, and thus determined by the whole court. The case did not rest under this decision. It went into the court of appeals, where it was argued, and again decided. One of the judges in that court uses the following language: "The legislature without doubt used the word *alienated* in the ordinary sense which belongs to it," meaning a transfer of the title. The judgment of the supreme court was affirmed by the court of appeals, and for aught appearing in the report of the case, by the unanimous judgment of that court. (1 *Comst.* 290.)

Bouvier, in his *Institutes*, (2d Vol. § 1992,) says that the legal definition of the term "alienate" is the act by which the *title* to an estate is voluntarily resigned by one person and accepted by another, in the forms prescribed by law. Blackstone says that the most usual method of acquiring *title* to real estate is that of alienation. (2 *Black. Com.* 287.) Alienation is a mode of obtaining an estate by purchase, by which it is yielded up by one person and accepted by another. (*Cruise's Digest, title*

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32, ch. 1, § 1.) The term *alienate* has a technical legal meaning, and any transfer of real estate, short of a conveyance of the title, is not an alienation of the estate. No matter in what form the sale may be made, unless the title is conveyed to the purchaser, the estate is not alienated.

It can not be pretended that the plaintiff had parted with all her interest in the property insured. The legal title still remained in her, and her interest in the property was to the full amount of its value, or the price for which she had contracted to sell it. The plaintiff most clearly retained an interest in the property, to be protected by her policy. If the assured retain but a partial interest in the property, the policy will protect such interest. (*Aetna Fire Insurance Company v. Tyler*, 16 Wend. 385.)

I am entirely satisfied that the contract to sell and convey the property to Hicks, was not in the legal, or technical sense of the word an alienation of the estate, within the meaning of the 7th section of the act of incorporation of the defendants, and therefore did not discharge them from liability to the plaintiff. (12 *Ohio Rep.* 305. 10 *Pick. Rep.* 40. 23 *Id.* 418.)

The defendants also insist that they are not liable in this action to the plaintiff, for the reason that she omitted to set forth, in her application for the insurance, that the mill was incumbered by the Lucas mortgage, which was then a lien upon the property; and that she omitted to notify the defendants in writing of the same, in answer to the interrogatory upon the margin of the application, which rendered the policy void, upon the ground that it was a breach of warranty, or a concealment of important matters affecting the risk. The proof establishes that the agent of the company made out the application for the plaintiff to sign. He used the blank furnished to agents for that purpose. It is true that the by-laws of that company make the person taking the survey the agent of the applicant. Nevertheless he is still the agent of the company. He is not divested of his office, by being deemed the agent also of the person making application for a policy. I have always regarded this clause in the by-laws of these companies as a device resorted to by them

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for the purpose of shunning just responsibility. They employ their own agents and send them abroad in community with their printed blanks, and such instructions as the officers of the company deem proper and necessary to give them. The business of these agents is to obtain insurances for their principals; the company employing them for that purpose. The public know nothing of their by-laws or the instructions under which such agents transact their business. They are regarded as the agents of the company, and confided in, as being competent to transact the business intrusted to them accurately, and according to law.

Gray, the surveyor and agent of the defendants, was applied to for an insurance of the plaintiff's mill. He proceeded to make a survey, and went to the mill, about seven miles from the plaintiff's residence; he then saw the property, its situation, and how bounded, the distance from other buildings, for what purpose occupied, and by whom. The plaintiff did not accompany him. Being an old lady seventy years of age, she relied upon Mr. Gray to transact the business and do whatever was necessary to be done to insure her a valid and binding policy. It appears that Gray was informed by the son of the plaintiff, at the time he made out the application, and while drawing it for the plaintiff to sign, that there was a mortgage on the premises, given by Lucas, and told him all the particulars about it. Notwithstanding such information the agent left the application entirely a blank in relation to any incumbrance upon the property.

Neither the act of incorporation nor the by-laws declare the policy void, for the omission of the applicant to give notice of an incumbrance upon the property. Neither is it required that a written notice of such incumbrance be given. Nothing is said in the policy itself, or in the printed proposals annexed thereto, requiring a notice in writing or otherwise to be given, by the applicant, of a prior mortgage or incumbrance upon the property. In the printed proposals provision is made that when buildings are mortgaged at the time they are insured the mortgagee may have the policy assigned to him, on his signing the premium note, or giving security for the payment of the same,

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and obtaining the consent of the company, which assent and assignment shall be entered on said policy. If a notice of the existence of the Lucas mortgage was necessary to be given by the applicant, I have no doubt it was sufficiently given in this case, and legally and properly established on the trial. The proof shows positive notice given to Gray, the agent of the company, and that was sufficient.

His being declared by the by-laws the agent of the applicant, as above remarked, did not divest him of his attributes as an agent of the defendants. He was ~~in~~ in the employment of the defendants, soliciting risks, and making contracts for the company with any body and every body who might wish to insure. He also made out the applications, and prepared the necessary papers to effect insurances, and it would, in my opinion, be little less than legalized robbery to allow these insurance companies to escape from liability upon the merest technicality possible, and that too when created by their own by-laws, which remain a sealed book to ninety-nine out of every hundred persons insured. The authorities settle this question against the defendants, and without showing any more valid defense against the plaintiff's claim the judgment can not be disturbed. (*Sexton v. Montgomery Co. Mutual Insurance Co.* 9 Barb. S. C. Rep. 181. *McEwen v. The Same*, 5 Hill, 101. 3 Denio, 254.)

The defendants further insist that the plaintiff can not legally recover in this action, on the ground that the application omitted to mention that the house and barn were standing within ten rods of the mill, in answer to the interrogatory upon the margin of the application; insisting that it was a breach of warranty, or a concealment of material facts affecting the risk.

Within the principle, as laid down in *Chitty on Contracts*, p. 452, and the cases there cited; also the case of *Gates v. The Defendants in this action*, (3 Barb. S. C. Rep. 73,) and the same case decided in the court of appeals, (2 Comst. 43,) it seems to be a well settled rule, that the applicant for an insurance merely stating the nearest buildings, without professing to do more, or to make any further statement, it does not amount to a warranty that there are no other buildings within the given dis-

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tance of ten rods. If there are other buildings, it amounts to the withholding of information which was called for by the interrogatory, and then the important question arises, whether it was material to the risk. If it did not increase the risk of the defendants, then the information withheld was immaterial. This was a question of fact, proper to have been submitted to a jury, if the cause had been tried before a jury. The waiver of a trial by jury, and consenting to a trial by the court, must be governed by the same principles and rules of law as are applicable to a trial by jury. Unless the finding of the court is wholly without evidence to support it, or clearly and palpably against the weight of evidence, a new trial should not be granted. It can not be necessary to recapitulate the evidence upon this point. The location of the house and barn was such that Gray the agent did not deem it important or necessary to refer to either in filling out the application. The house was nearly nine rods from the mill, and on the opposite side of a canal 70 feet wide—a small low building—and the barn, nearly eight rods from the mill, standing upon the tow path of the canal, and also a small low building, afforded a very good reason for coming to the conclusion that the risk of the defendants was not increased by the existence of these buildings. Not a particle of testimony is to be found in the case, on which to base a contrary conclusion. Although the mill was destroyed by fire in the month of July, in a dry season of the year, still the house and barn in question were not hurt or injured thereby. This fact, to say the least of it, is some evidence that the risk of the mill was not increased by the existence of the house and barn.

The opinion of the court of appeals in the case of *Gates v. The Madison Co. Mutual Ins. Company*, (2 Comst. 43,) seems to be decisive upon this question. Judge Jones delivered the opinion in that case, which was unanimously concurred in by the whole court, and as far as it applies to the case now under consideration, must be regarded as the law of the case. The case in Comstock, as well as the present one, is clearly distinguishable from the cases relied upon by the defendants' counsel,

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in the 5th of Hill, 188; 7 Id. 122; 2 Denio, 72, and the other cases to which the court were referred upon this point.

The witness, Gray, testified that the reason why he did not mention the house and barn in the application was, the abundant supply of water there. The defendants' counsel objected to this testimony, but without stating any ground of objection. Whether such objection was made because the question to which it was an answer was leading, or upon some other ground, the bill of exceptions does not show. I am inclined to the opinion that the testimony was legal, as tending to prove that the risk of the defendants was not increased by the house and barn. At all events if the proof was not strictly legal it affords no ground for the granting a new trial in this action. The defendants' counsel should have stated the grounds of objection, in order to make it available on this motion.

My conclusion upon the whole case is, that the judgment should be affirmed, with costs.

Judgment affirmed.

[DELAWARE GENERAL TERM, July 13, 1852. *Mason, Shankland, Crippen and Gray, Justices.*]

BUMP *vs.* VAN ORSDALE.

Where, in an action upon a promissory note payable to M. N. or bearer, brought by a person to whom the same had been sold and delivered by M. N., the latter is examined as a witness in behalf of the plaintiff, the defendant is a competent witness to be sworn in his own behalf, and examined to the same matters testified to by M. N., the former owner of the note.

THIS was an action brought to recover the amount of a promissory note given by the defendant, of which the following is a copy: "\$40. For value received, I promise to pay Margaret Norton or bearer, forty dollars, one year from date, with use. Dated South Bainbridge, May 14, 1845.

(Signed) JOHN VAN ORSDALE."

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The action was tried before Robert O. Reynolds, Esq. the referee, and a report made therein finding due to the plaintiff \$58,25, on the 6th day of January, 1852. It appeared on the trial that the payee of the note transferred it to Jerusha Van Orsdale in October, 1845, and that she afterwards sold and transferred it to the plaintiff in this suit, who paid her \$40 for the same. The defendant then offered himself as a witness in the action, under § 399 of the code of 1851, on the ground that Jerusha Van Orsdale, the assignor of the note in controversy, had been called and examined as a witness by the plaintiff, and the defendant was offered to the same matters testified to by her. The plaintiff objected to the competency of the defendant as a witness in this action. The referee sustained the objection, and the defendants' counsel excepted. This was the only question presented by the bill of exceptions.

Stephens & Duell, for the appellant.

Sayre & Banks, for the respondent.

CRIPPEN, J. By the code of 1848, § 351, it was provided that no person offered as a witness should be excluded, by reason of his interest in the event of the action. This provision, however, was declared not to apply to a party to the action, nor to any person for whose immediate benefit it was prosecuted or defended. The code was amended in 1849, and the above section divided into two sections. Section 398 re-enacted the first paragraph of § 351 as an independent section; and § 399 enacted the remainder of § 351 of the code of 1848, and amended the same by adding thereto, "that the preceding section shall not apply to any assignor of a thing in action assigned for the purpose of making him a witness."

The courts in giving a construction to § 399 of the amended code of 1849, decided that it did not exclude an assignor as a witness, unless he had an interest in the event of the action, although the demand was assigned by him for the purpose of

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becoming a witness. (7 *Barb.* 157. 3 *Howard's Pr. Rep.* 401. 5 *Id.* 8.)

The code was again amended in 1851, and § 398 of the code of 1849 remained unaltered; but that part of § 399 relating to the exclusion of an assignor, where the demand had been assigned for the purpose of making such assignor a witness, is entirely omitted, and the following provision adopted in its place: "when an assignor of a thing in action or contract is examined as a witness on behalf of any person deriving title through or from him, the adverse party may offer himself as a witness to the same matters, in his own behalf, and shall be so received."

Under the foregoing provision of the amended code of 1851, the defendant insists that he was a competent witness to be sworn in his own behalf, and examined to the same matters testified to by Jerusha Van Orsdale, the former owner of said note, and from whom the plaintiff obtained the same.

The promissory note on which the action was brought, was payable to Margaret Norton, or bearer. It was therefore negotiable by mere delivery, without any other act or assignment on the part of the person transferring the same; and the holder thereof became *prima facie* the owner of said demand. Prior to the code, the payee of a promissory negotiable note, who had transferred the same, and parted with all his interest therein, was a competent witness for the plaintiff in a suit brought to recover on such note. He is still a competent witness in such suit, and may be sworn and examined on the part of the plaintiff. The question then arises, whether the defendant may not also be sworn and testify in his own behalf, in case the plaintiff calls and examines the person through or from whom he derived his title to said note; or, in other words, whether the transfer of a negotiable note by mere delivery is in fact an equitable or legal assignment of a thing in action, or a contract within the meaning of the foregoing provision of § 399 of the code.

The advantages of commerce, from the use of bills of exchange, induced the courts at an early day to allow them certain peculiar privileges, in order to give full effect to their utility; the

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first and most important of which was, that although a bill of exchange is a chose in action, yet it may be assigned so as to vest the legal as well as equitable interest therein in the indorsee or assignee, and to entitle him to sue thereon in his own name. (*Chit. on Bills*, 4.) Chitty again says, at page 5, that the first peculiar privilege of a bill of exchange is its *assignable quality*.

Again; Chitty says that it is well established that bills of exchange, whether payable to order or bearer, are equally negotiable from hand to hand ad infinitum; and that the transfer vests in the *assignee* a right of action on the instrument *assigned*, sustainable in his own name. But in general, unless the words "or bearer," "or order," or some other words authorizing the payee of a bill or note to *assign* it, be inserted therein, it can not be transferred so as to give the *assignee* a right of action against any of the parties, except the indorser himself. (*Chit. on Bills*, 108.)

A transfer by delivery, without any indorsement, when made on account of a pre-existing debt, or for a valuable consideration passing to the *assignor* at the time of the assignment, imposes an obligation on the person making it, to the person in whose favor it is made, similar to that of a transfer by indorsement. And it is now settled that, in such case, unless it was expressly agreed at the time of the transfer, that the *assignee* should take the instrument *assigned*, as payment, and run the risk of its being paid, he may, in case of default of payment by the drawee or maker, maintain an action against the assignor, on the consideration of the transfer. (*Chit. on Bills*, 143.)

Where a transfer by delivery, without indorsement, is made merely by way of sale of a bill or note, or by way of discount, and not as a security for money lent; or where the *assignee* expressly agrees to take it in payment and run all risks, he has in general no right of action whatever against the *assignor*. (*Chit.* 145, 6.)

Chitty, as will be seen by the foregoing references, regards the transfer of a bill or note, an assignment of the demand, and the person making the transfer the *assignor*, and the one taking

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it, the *assignee*. No matter in what way a demand is transferred, whether by mere delivery, as in the case of promissory notes payable to bearer, or by indorsement of a note payable to order, or by verbal or written agreement, the thing itself, the demand passes from one to the other. The words, transferred, set over, assigned, have the same meaning in such cases. The person transferring the demand, is in fact and in law the assignor of it, and the person to whom it is transferred, or set over, the assignee. Webster gives the following definition of the word "assign:" to allot; to make or set over; to transfer; to sell or convey. Bolles, in his dictionary, says that the word "assigning" means allotting; appointing; transferring.

Everts & Scranton v. Palmer, (7 Barb. Rep. 178,) was an action brought on a promissory note made payable to the defendant or order, and indorsed by him. The note had been transferred to the plaintiffs by one Thompson. Griffin, the maker of the note, testified that the defendant indorsed the note for his accommodation, and that he transferred it to Thompson. The plaintiffs offered Thompson as a witness on the trial. The court in their opinion regard Thompson as the assignor of the note within the meaning of sections 398 and 399 of the code of 1849. In *Canfield v. Monger*, (12 John. 346,) Monger delivered a note he held against one Lindsey to Canfield, to receive the amount and apply on a note from Monger to Canfield. The court say in their opinion in that case, that the delivery of the note to Canfield amounted to an equitable assignment and vested in him an interest which Monger could not defeat at his pleasure.

In *Prescott v. Hill*, (17 John. 292,) the court say in their opinion that the mere delivery of a chose in action upon a good consideration is an assignment of the demand. It appears quite clear from a careful examination of this case that the learned referee erred in excluding the defendant as a witness under the offer of his testimony, to be confined to the same matter about which the prior owner and holder of the note had testified on her introduction as a witness on the part of the plaintiff.

I am satisfied that this construction is within the letter and spirit of the amended code of 1851. The report of the referee

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should therefore be set aside; costs to abide the event of the suit, and a new trial granted.

SHANKLAND, J. I am of opinion the referee erred in excluding the defendant from being a witness in his own behalf, under the 399th section of the code. It declares that "when an assignor of a thing in action, or contract, is examined as a witness, on behalf of any person deriving title through, or from him, the adverse party may offer himself as a witness to the same matter in his own behalf, and shall be so received."

It is true, the usual term applied to the parties transferring negotiable mercantile paper, is not "assignor," nor is the usual term applied to the *act* of transfer "assignment;" but the words *indorser*, *bearer*, transfer, negotiate, are the proper mercantile terms. But, "assignor, of a thing in action, or contract" comprehends a much larger class of contracts than mercantile paper, and must include them also.

So, the word "assignment" means the conveyance of the interest a man has in an estate, or chose in action; and is more comprehensive than the terms *indorser*, negotiate, or the like mercantile words applied to negotiable paper. The terms of the section being sufficiently comprehensive to include the case of one who transfers negotiable paper by mere delivery when it is made payable to bearer, as in this case, we are next to examine whether there is any reason why the case should be excluded from the said section.

It had become quite common for the holders of negotiable paper which was infected with usury, or other seeds of a valid defense, to transfer them to others, in order to embarrass defendants, and to enable the former holders to become witnesses in the causes, in favor of their assignees; and when the code of 1848 authorized and required all actions on contracts (§ 91) to be prosecuted in the name of the real party in interest, in accordance with the old equity practice, it was foreseen that an increase of the former evil would be the consequence, unless some countervailing check was provided. Accordingly, in section 852 of that code, they enacted that the last section (§ 351)

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should not apply to a party to the action, nor to any person for whose immediate benefit it is prosecuted or defended; nor to any assignor of a thing in action, assigned for the purpose of making him a witness." That section intended to exclude an assignor from being a witness, if he assigned for the purpose of making himself a witness. The *cause* of the exclusion was not that he remained *legally interested*, but on the ground of *public policy*.

The courts in Pennsylvania had established it as a rule of evidence, in that state, long prior to our code, and held it to be contrary to public policy to allow the assignor of a chose in action to be a witness in favor of the action. They say, "This rule is founded on reasons of public policy and justice; and was imperiously demanded by the experience of the frauds and corruptions to which the former practice led, where a party might create, or establish a contract for his own benefit, and derive an advantage by establishing it by his own oath. It enables him to bring his own oath into market." (2 *Barr's Pa. Rep.* 46. 5 *Id.* 395. 6 *Id.* 325, 398. 7 *Id.* 315. 10 *Id.* 428.)

The codes of 1848 and 1849 intended to adopt the same principle here; but the decision of this court in *Everts v. Palmer*, (7 *Barb.* 178,) by overlooking the true ground of exclusion of the witness, and by putting it upon the ground of interest only, had a direct tendency to defeat the usefulness of the provision, and render it abortive. It was doubtless in consequence of this decision that the legislature, in their amendment of the code, in 1851, changed the section, by *omitting* to exclude the assignor of a thing in action, although assigned for the purpose of being a witness, but allowed the adverse party to be a witness to the same matter, as a countervailing check. This provision is wiser and better calculated to elicit truth than the former one. But the history of legislation, on this subject, I think, shows conclusively that the section includes parties to negotiable paper. In the case of *Everts v. Palmer*, above cited, the words "assignor of a thing in action," were thought to include the case of a vendor of a negotiable note. The words of the present section are equally extensive.

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But an examination of other sections of the code proves that an assignment of a promissory note is within the terms "*assignment of a thing in action*." Section 111 of the code of 1851 enacts, that "every action must be prosecuted in the name of the real party in interest, * * * * but this section shall not be deemed to authorize the assignment of a thing in action, not arising out of contract." It is quite clear this section includes negotiable paper of all kinds. The next section is, "In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off, or other defense existing at the time of, or before notice of, the assignment; but this section shall not apply to a negotiable promissory note, or bill of exchange transferred in good faith, and upon good consideration, before due." All other notes and bills are, of course, included in this section, and those excluded would have been included in the words "*assignment of a thing in action*," had it not been for the express exception.

In the case of *Billings v. Jane*, decided at the last term of this court, (a) we held, that a note payable to the order of F. U. Fenno, passed by a sale and delivery for a good consideration, without indorsement, so as to enable the assignee to maintain the action in his own name under section 111. (*See also Hedges v. Seely*, 9 Barb. 215.)

We have thus seen that the negotiation of commercial paper, by delivery or other modes of transfer, is within the meaning of the term assignment as used in the code. That such contracts are things in action, and that the assignor of such contract is within the intent and policy of the law. In my judgment we should hold the defendant a competent witness in his own behalf in this case; and for the reason that he was excluded a new trial should be granted; with costs to abide the event.

There is as much necessity of applying the provisions of this section to the cases of negotiable paper, as to any other in the whole range of legal controversies, and the policy of hearing

(a) *Ante*, p. 620.

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both sides, on their respective oaths, should be most liberally applied.

MASON, J. and GRAY, J. concurred.

New trial granted.

[DELAWARE GENERAL TERM, July 13, 1852. *Mason, Shankland, Crippen and Gray, Justices.*]

JUDSON vs. COOK.

All who aid, command, advise or countenance the commission of a tort by another, or who approve of it after it is done, are liable, if done for their benefit, in the same manner as if they had done the tort with their own hands. Thus where the president of a bank, at whose suit an attachment had been issued and levied on the property of the defendant therein, when applied to by the constable for directions in regard to selling the property, told him to do his duty; and directed the attorney of the bank to examine the question, and the facts, in relation to a prior lien upon the goods, and to act his judgment, whereupon the attorney instructed the constable to sell the goods; and the president of the bank attended the sale, and bid off a part of the property; *Held* that this was sufficient to connect the president with the taking or detaining of the goods, and that he was liable in an action therefor.

THIS was a motion to set aside a nonsuit, granted at the Chemung circuit, in June, 1849; and the only question to be determined was whether the evidence given by the plaintiff was sufficient to connect the defendant with the taking or detaining the goods of the plaintiff, for which the action was brought. The facts were these. The plaintiff was sheriff of Chemung county, and as such had levied on the goods in question, by virtue of an execution in favor of one Hotchkiss and against Alex'r Cornell and William H. Holmes. Subsequently the defendant, who was president of the Chemung Canal Bank, handed a note against said Alexander Cornell to a Mr. Vanderlip, an attorney, for collection, and said attorney took out an attachment against Cornell in favor of the bank, and gave it to William McCann, a constable, to execute. McCann levied on the property in ques-

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tion, and sold the same on an execution issued on the judgment obtained in said attachment suit. After McCann took the goods on the attachment, he heard of the previous levy by the plaintiff and informed the defendant of it, and asked for directions. The defendant replied, "You know your duty; do that, and that will be right." The defendant was at the sale and bid off some of the property at one bid. After Vanderlip, the attorney, was informed that the bank attachment had been served, and that the plaintiff claimed the goods under a former levy, he conferred with the defendant in regard to selling the goods; and the latter directed the attorney to *examine the question and facts*, and act his judgment, and Vanderlip concluded to sell the goods, and so directed the constable before the sale. The defendant was present at the sale. Vanderlip received all his directions about the matter from the defendant. Mr. Quinn, the agent or attorney for the plaintiff, met the defendant at the store of one Beecher, where the goods were deposited after the levy by the constable, and before the sale, and asked him if he would abandon the levy; and he declined to do so. The defendant was called by the plaintiff as a witness, and testified that he heard of the conflicting claims, and talked with Vanderlip about it before the sale, and told him to do his duty; and that he only acted as an officer of the bank. On this evidence the plaintiff was nonsuited, for the reason that the defendant was not shown to be guilty of converting the goods; and the plaintiff excepted.

E. Quinn, for the plaintiff.

B. Davis Noxon, for the defendant.

By the Court, SHANKLAND, J. For the purposes of this motion to set aside the nonsuit, it must be taken for granted that the plaintiff had consummated a levy by virtue of the execution in his hands, and was legally entitled to the possession of the goods, and that the taking and conversion by McCann, under the attachment and execution in favor of the bank, was tortious.

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The admitted rule of law is, that all who aid, command, advise or countenance the commission of a tort by another, or who approve of it after it is done, if done for their benefit, are liable in the same manner as they would be if they had done the same tort with their own hands. (19 *John*. 381. *Bishop v. Ely*, 9 *Id.* 294. *Morgan v. Varick*, 8 *Wend.* 587. *Coats v. Darby*, 2 *Comst.* 517. 1 *Chit. Pl.* 67.)

Was there sufficient evidence to go to the jury in this case, that the defendant Cook did any act to make him liable, within the above rule of law? I am clearly of opinion that he did. In the first place, he was president of the bank, the plaintiff in the suit, whose process he undertook to control; and he may properly be assumed to have been a stockholder in the corporation, and interested in the avails to be collected in that suit. In the second place, when he was inquired of by the constable, for directions, he answered, "Do your duty;" an expression which, when taken in connection with the other facts in the case, may and probably did mean, *go on and sell*. At all events, his meaning was a proper question for the jury. Again; when informed by Vanderlip of the plaintiff's claim to the property, and on being asked for directions whether to sell the goods on the bank execution, he directed the attorney to examine the *question* and *facts*, and act his judgment. What was this direction but saying to the attorney, *go on and sell*, if in your opinion we can hold the property? The attorney decided to sell, and the defendant is as responsible for the directions which the attorney gave, in pursuance of the discretion vested in him by the defendant, as he would have been if he had given the same directions in person. Again; after the attorney had given directions to sell, in pursuance of the discretion vested in him by the defendant, the latter attended the sale, and by his presence countenanced the transaction, not by his silent presence alone, but by actually bidding off some of the property. In the case of *Babcock v. Gill*, (10 *John.* 287,) it was held that where the defendants purchased property of one Whitney, knowing of the plaintiff's claim to it, it was a conversion, for which they were liable. In the present case the defendant purchased a portion of the property

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sold by McCann, knowing of the plaintiff's claim. This was assuming a control of it in defiance of the plaintiff's claim, and was a conversion of the property thus purchased.

Again; when the plaintiff's agent called on the defendant, to relinquish the levy on the bank execution, he declined to do so. He did not decline on the ground that he had not the control of the execution, nor for any other special reason. He having the control of the execution, his declining to relinquish the levy was, under the circumstances of this case, an assertion of the right to hold the property in defiance of the plaintiff's claim. Taking the whole evidence together, it makes out a strong case, connecting the defendant with the conversion; and the fact that he acted as the agent of the bank, does not in the least diminish his liability.

There should be a new trial granted, with costs to abide the event. (This action was commenced in 1846, and before the code.)

New trial granted.

[DELAWARE GENERAL TERM, July 18, 1852. *Mason, Crippen, Shankland and Gray, Justices.*]

 THE MONTGOMERY COUNTY BANK vs. MARSH.

Where an indorser resided in the town of Palatine, in which town there was a post office, at Palatine Bridge, but had a box for receiving letters at Canajoharie, where his principal place of business was, and where he received most of his letters, *it was held*, that a notice of protest addressed to him at Canajoharie, was good service, although his residence was nearer to the post office in Palatine Bridge, than to that in Canajoharie. HAND, J. dissented.

It does not vary the case that the plaintiffs' cashier *knew* that the defendant resided in Palatine Bridge, since he also knew that the defendant's place of business was in Canajoharie; and that the note was dated at the latter place, as were his letters to the plaintiff concerning the note.

A stockholder of a bank is a competent witness for the bank, under the code, § 398.

A corporator is not a party for whose immediate benefit the suit is brought, under § 396 of the code.

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THIS action was brought upon two promissory notes, made by Loucks & Gray, payable three months after date, to the order of Peter G. Loucks, and indorsed by him and the defendant, Seymour N. Marsh; the one note payable at the Bank of the State of New-York, in the city of New-York, for \$1000; the other payable at the Montgomery County Bank for \$800. The notes were dated May 2, 1848. The defendant denied the receipt of notice of protest as to both notes, and one question was as to the sufficiency of the service of notice. The facts are sufficiently stated in the opinion. With respect to the \$800 note, another question was made, whether the notary who protested it was a competent witness for the plaintiffs, he being a stockholder of the bank. The cause was tried before Mr. Justice Paige at the Fulton circuit, in December, 1849, without a jury. The learned judge held that the notes were properly protested, and that the notary, who was a stockholder, was a competent witness for the plaintiffs, and gave judgment for the amount of the notes.

The defendant appealed to this court.

T. B. Mitchell, for the appellant.

John Wells, for the respondent.

WILLARD, P. J. The plaintiffs sued as holders of a promissory note, dated at Canajoharie, May 2, 1848, and made by Loucks & Gray, payable three months after date to the order of Peter G. Loucks, for \$1000, at the Bank of the State of New-York, in New-York city. It was indorsed by Peter G. Loucks, the payee, and by the defendant, Seymour N. Marsh. The present question arises between the plaintiffs and Seymour N. Marsh, who was the second indorser. The question as to the above note is, whether a notice of protest, addressed to him at Canajoharie, was a good service, his residence being at the time in Palatine, and the post office at Palatine bridge being in the town where he resided, and nearer by about half a mile to his place of residence than the Canajoharie post office.

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The act of April, 1833, (*Laws of 1833, p. 394, § 8,*) and the law of 1835, (*Laws of 1835, p. 554,*) have nothing to do with this question, as the proof of sending the notice is admitted, and does not rest upon the certificate of the notary.

The evidence is that Marsh had a box for receiving letters at the Canajoharie post office, where he received more letters than at Palatine Bridge, if we may judge from his postage account, in the proportion of sixteen to one. His place of business was at Canajoharie. He was engaged in the making and selling of trusses. They were manufactured at Cherry Valley, where he had an office. He had an office also in New-York city. "The head-quarters," as the witness describes it, "for his truss business was at Canajoharie." It was shown, that when at home, he was in Canajoharie nearly every day. It was proved by the postmaster of Canajoharie, that the defendant invariably refused to take notices of protest addressed to him at Canajoharie, after he moved to Palatine. Three letters were given in evidence by the plaintiffs, from the defendant to them, in relation to a note they held against him, which were dated at Canajoharie in the months of May and July, 1848, while the note in question was running to maturity. The defendant did not add to his name, as indorser, his place of residence.

The notice was properly addressed to the defendant at Canajoharie. That was the principal place of business of the defendant, and where he received the most of his letters. His refusal to take out protests was not known to the plaintiffs, and affords no evidence that the notices addressed to him there were misdirected. The true question in all these cases is, whether the holder of the note or bill has made use of due and reasonable diligence to bring home notice of its dishonor to the party whose contingent liability depends upon his having notice. (*Per Walworth, Ch. in Remer v. Downer, (23 Wend. 623.) In Reed v. Payne, (16 John. 218.)* Ch. Justice Spencer, in delivering the opinion of the court, says, if the notice be sent to the post office to which the party usually resorts for his letters, it would admit of no doubt that such notice would be good, although it was in a different town from that in which he resided. This

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doctrine was again asserted in *Bank of Geneva v. Howlett*, (4 *Wend.* 328, 331.) It is not, say the court, indispensable that the notice should be sent to the office nearest to the residence of the party, nor even to the town in which he resides. It is sufficient if it be sent to the office to which he usually resorts for his letters, and where he would probably receive it as soon as at the office nearer to him. The same principles have been declared by the supreme court of the United States in *The Bank of Columbia v. Lawrence*, (1 *Peters*, 578. 3 *Kent's Com.* 107.) The case of *Cuyler v. Nellis*, (4 *Wend.* 398,) requiring notice to be sent to the post office *nearest* the defendant, is expressly overruled by the court of errors in *Remer v. Downer*, (23 *Wend.* 620.)

It is no objection to this service that the plaintiffs' cashier *knew* that the defendant resided in Palatine, and that he subjoined the name of Canajoharie to the defendant's indorsement on the note. He was probably led to do so from the fact that the note was dated at Canajoharie, and that the defendant's letters of business, received by him about the same time, were dated at the same place. The cases before cited show, that the notice to the defendant would have been well served had it been addressed to him at either post office.

With respect to the \$800 note, another question arises, *viz.* Whether a stockholder of the plaintiff's bank was a competent witness for the plaintiff? The objection was, that he was incompetent on the ground of interest, and that the action was brought for his benefit.

The code takes a distinction between the examination of *parties*, to which ch. 6, of tit. 12 is devoted, (§§ 389 to 397,) and the examination of *witnesses*, which is regulated by the succeeding chapter. Wells, the witness who was objected to, was not a *party* to the action, and could not have been examined under chapter six, unless he could be treated by § 396, as the person for whose immediate benefit the action was brought. The corporation of a corporation, formed for municipal purposes, is a competent witness in behalf of his corporation in respect to corporate claims, or liabilities of all kinds, if he have no personal

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interest beyond that of a corporator. (*Cowen & Hill's Notes*, 1541.) But where the corporation is instituted for private emolument, such as banks, insurance companies, and the like, the interest of the corporators is direct, and they are incompetent to testify in support of their claim. (*Id.* 1543.) The objection in such cases is not the common law, technical one, of being a *party* to the record, but arises from *interest* alone.

The 398th section of the code, in the chapter on the examination of witnesses, enacts, that no person offered as a witness shall be excluded by reason of his *interest* in the event of the action. Hence, if Wells was incompetent merely on the score of interest, the code removed the objection. The 399th section provides that the preceding section shall not apply to a *party* to the action, nor to any person for whose immediate benefit it is prosecuted or defended, nor to any assignor of a thing in action, assigned for the purpose of making him a witness. It leaves those cases as they had already been provided for in the preceding chapter, or as they stood at common law.

The 6th chapter just cited is the substitute for the old bill of discovery. Such bill could never be sustained against the individual corporators. The corporation itself must be made a party. The confessions or declarations of a corporator would be inadmissible in a suit between the corporation and a stranger. (*Angel & Ames on Corp.* 204, § 4. 1 *Pick.* 302, 304.) A stockholder of a bank, in a suit brought by the bank, can not be treated as a *party* to the suit, nor as a person for whose immediate benefit the suit is brought, within the meaning of the code.

The principle involved in this case has been settled by the supreme court of the United States. Under the 11th amendment to the constitution of the United States, it is declared that the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another state, or subjects of any foreign state. In the case of *The Bank of the United States v. The Planters' Bank of Georgia*, (9 *Wheat.* 904,) the state of Georgia, together with divers citizens, were the stockholders of the bank, and it was urged that this circum-

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stance ousted the court of jurisdiction. But it was held otherwise by the court. As a member of a corporation, says Marshall, Ch. J. a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation, than are expressly given by the incorporating act. The case of *The Louisville, Cincinnati and Charleston Railroad Co. plaintiffs in error, v. Letson, defendant in error*, (2 How. Rep. S. C. U. S. 497,) went a step further. In the latter case the jurisdiction of the court was denied, not only upon the ground that a state was one of the corporators, but also that two members of the corporation sued were citizens of North Carolina, and that two corporations in South Carolina were members, having in them members who were citizens of the same state with the defendant in error. It involved the question whether a corporation in a state could be sued in the circuit courts of the United States, by a citizen of another state, unless all the members of the corporation were citizens of the state in which the suit was brought. The court held that the suit could be sustained. They treated the corporation as a citizen of the state in which it was incorporated, and disregarded entirely the local residence of the corporators. The prior cases of *Curtis v. Strawbridge*, (3 Cranch, 267;) *Bank of U. S. v. Deveaux and others*, (5 Id. 84;) *Commercial and Railroad Bank of Vicksburgh v. Slocumb and others*, (14 Pet. 60,) were reviewed, and so far as they conflicted with the above views, were overruled. It is now well settled in the United States court that the corporation alone is treated as the party, for all purposes, and that the court does not look behind to see where the corporators reside.

The question we are considering arose in *The Washington Bank of Westerly v. Palmer*, in the superior court of New-York. (2 Sandf. 686.) It was there held, in a well considered opinion, that a stockholder in an incorporated company, is not a party to the action, nor a person for whose immediate benefit it is prosecuted, within the meaning of section 899 of the code, and is therefore a competent witness in favor of the corporation. And

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the same doctrine was again repeated by the same court in *The New-York and Erie Railroad Co. v. Cook*, (2 Sandf. 732.)

The 399th section of the code is the same as the first proviso in Lord Denman's act, 6 and 7 Victoria, ch. 85, § 1. The expositions of the British statute by their courts, are in conformity to the views above expressed. (See *Hart v. Stevens*, 6 Ad. & El. N. S. 937; *Hill v. Kitching*, 3 Man. Granger & Scott, 299.)

I am aware that in the case of *The President of the Bank of Ithaca v. Bean and others*, the supreme court for the 6th district decided that the president of a bank, who is also a stockholder in the bank, can not be a witness for the bank in an action by the bank against a third person. (2 Code Reporter, 133.) But in that case the president was a party to the action, and for that reason he was liable to be proceeded against under the sixth chapter, and was expressly exempted from the operation of section 398. There are some remarks by Mr. Justice Mason, in delivering the opinion of the court, indicating that in his opinion a stockholder was a person for whose benefit the action is brought within the meaning of sections 396 and 399. But those remarks were not necessary to a decision of the case, and can not, in my judgment, be supported.

Wells was a competent witness under the code, and consequently, the judgment of the circuit court should be affirmed.

PAIGE, J. concurred.

HAND, J. dissented.

Judgment affirmed.

[ST. LAWRENCE GENERAL TERM, September 1, 1851. Willard, Paige and Hand, Justices.]

ROBERTSON vs. KETCHUM.

An exchange of horses was made between the plaintiff's agent and the defendant, upon terms which, as the defendant knew, the plaintiff had himself refused to adopt, as the basis of an exchange. The plaintiff did not know of the bargain until after it was made; nor did he know the terms of it, and that it was contrary to his proposition, until after the death of the horse received in exchange had put it out of his power to return it. And he repudiated the bargain as soon as he knew what it was. *Held* that an action might be maintained by the plaintiff to recover the value of the horse delivered by his agent, to the defendant.

A transfer of property by an agent who exceeds his authority in a material point, passes no title to the thing delivered; which may therefore be reclaimed by the owner.

In the contract of sale or exchange by an agent, as in all other acts done by him, it is essentially requisite, in order to bind the principal, that the authority should be pursued; otherwise the contract is void. This must especially be the case when the purchaser knows that the agent is violating his instructions, and they agree to conceal from the principal the fact of such violation.

THIS cause was originally commenced in a justice's court, where the plaintiff complained that on or about the 26th of November, 1849, he was the owner of, and had in his possession, a certain bay or sorrel mare, of the value of \$30, which afterwards came into the defendant's possession without the consent of the plaintiff, and that the defendant refused to deliver the said horse to the plaintiff; wherefore he demanded judgment for \$30. The defendant, by his answer, denied the allegations in the complaint; and alledged that on the 26th of November, 1849, the plaintiff and defendant traded and exchanged horses, upon the following terms: the defendant let the plaintiff have a certain black horse, and the plaintiff let the defendant have a certain bay mare, and agreed to deliver to him a double harness; and that the defendant in no other manner, and on no other conditions, ever received any horse or mare of the plaintiff. On the trial, William J. Robertson, a witness for the plaintiff, testified that he was a son of the plaintiff; that the plaintiff owned a bay mare; that about the 26th of November, 1849, the witness let the defendant have said mare; that his father did not authorize him to part with the mare. On his cross-examination

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he testified that he lived with the plaintiff and was in his employ, in the harness business; that he was between nineteen and twenty years old; that he was in the habit of making sale of some few articles out of the shop, when no other person was present; that the plaintiff did not approve of his bargains, as a general rule, but never repudiated any, except this one. He further testified as follows: "The defendant exchanged a horse for the mare; the bargain for the exchange was made in the shop, we talked about it at Mr. Durand's, the first conversation was in the shop, the plaintiff, defendant, Mr. Kingsbury and myself were present at the conversation, it was in relation to the trade; the plaintiff, defendant and witness came into the road and had a conversation about the horse and looked at him, I rode the horse in presence of the plaintiff: we all three went then into Mr. Durand's house: we talked about the trade in Mr. Durand's, defendant made a proposal to plaintiff for a trade, defendant proposed to let plaintiff have his horse for plaintiff's mare, a double harness and \$5; plaintiff said he would not give the harness to boot; I saw the plaintiff and defendant would not make a bargain, I asked the defendant to go to the shop and look the harness over, I did not go into Durand's again that night, plaintiff did not come out of Durand's, defendant and I went up to the barn and exchanged horses. I put the defendant's horse into plaintiff's stable and kept him over night, I do not know that the plaintiff saw the horse in the morning, but he did see him during the day. When I and the defendant made the trade in the shop, I told him I would give him between the horses, the harness, repair and oil it and put a new set of blinds, and a new set of round lines; a new set of pole straps he took with him. Defendant was to keep the new work he received a secret. On the strength of this bargain we exchanged horses, plaintiff said he would not trade in the night. The harness I let the defendant have was the harness we talked about in Durand's, a second hand harness. Durand, the plaintiff, defendant, Hiram Hoose and a stranger were present at Durand's when we had the conversation about the trade, the plaintiff said he was not willing to give the harness to boot, he also

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said he would not trade in the night, and that he would not make any new work for the harness. Plaintiff knew when the defendant and I went out. I, in the presence of the plaintiff, asked the defendant to go and look at the harness again, the plaintiff, defendant and I sat in the room around the stove when I asked the defendant to go to the shop and see the harness. But I do not know that the plaintiff knew where we were going." He further testified that the mare, in his opinion, was worth ten or twelve dollars; that the plaintiff was not a horse dealer, and it was not in the line of his business to trade harnesses for horses; that when the plaintiff was present the witness asked him about trades; that the witness never traded a harness for a horse, before this trade, and the plaintiff did not sanction this trade. That the witness asked the defendant to keep this trade a secret, and told the defendant he, the witness, would not let the plaintiff know any thing about it; that the plaintiff never told him, the witness, to trade the mare away; and the next morning after the trade he did not consent to it; that the work the witness was to do, unbeknown to the plaintiff, was worth \$6 or \$7. Another witness testified that on the Thursday next after the exchange the plaintiff and defendant were in the plaintiff's shop together; the defendant said he was sorry the plaintiff had lost his horse; the plaintiff said it was not his horse, and if he, the defendant, did not bring home the plaintiff's horse he would prosecute the defendant; the defendant said he had traded with W. J. Robertson, and that the plaintiff had acknowledged it. The plaintiff said there was no such thing. Defendant refused to bring the horse back. A witness for the defendant testified that he was present at the conversation between the parties, at Durand's; that "Wm. J. Robertson went out and the defendant followed him; the defendant came back and said they had traded; while we were talking the plaintiff came in again and said, have you traded? Defendant said, yes; defendant said if you are not suited with the trade we will trade back; plaintiff said, how did you trade? Defendant said, pretty near as you and I talked—a little different—and if you are not suited with the trade, we will trade back. Durand spoke and

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said to-night you mean; the defendant said yes, to-night, the defendant said if you are suited with the trade we will take something to drink and let that be the end of it." That the parties drank together, and soon afterwards separated. The jury found a verdict for the defendant, and the justice rendered a judgment for \$3,24, for costs. The county court of Washington county affirmed the judgment; and the plaintiff appealed to this court.

James J. Lowrie, for the appellant.

C. R. Ingalls, for the respondent.

By the Court, WILLARD, P. J. It was competent for Wm. J. Robertson, the son of the plaintiff, to act as agent for his father, notwithstanding his minority. A sale or exchange made by him of the horse in question, though without express authority from the plaintiff, would pass the title, if the latter with full knowledge of the terms of the sale, ratified and confirmed it. Subsequent assent, under such circumstances, is equivalent to a precedent authority. (*Dunlap's Paley on Agency*, 171, note o, where all the cases are collected.)

There can be no doubt, from the evidence, that the exchange of horses made by the agent was upon terms which the plaintiff had refused to adopt as the basis of an exchange; and this was well known to the defendant when he completed the exchange. The plaintiff did not know of the bargain until after it was made, nor did he know the terms of it and that it was contrary to his proposition, until after the death of the horse had put it out of his power to return it. He repudiated the bargain as soon as he knew what it was.

A transfer of property by an agent who exceeds his authority in a material point passes no title to the thing delivered, which may therefore be reclaimed by the owner. (*Dunlap's Paley on Agency*, 341.) In the contract of sale or exchange by an agent, as in all other acts done by him, it is essentially requisite, in order to bind the principal, that the authority either express or

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implied should be pursued. (*Id.* 212.) If the authority be not pursued, the contract is void. This must especially be the case, when the purchaser knows that the agent is violating his instructions, and they agree to conceal from the principal the fact of such violation.

There was no conflict in the evidence, on the fact that the actual exchange of horses, made by the agent, was upon a consideration which the plaintiff had never authorized, and that this was known to the defendant at the time. A verdict finding to the contrary is not merely a verdict against the weight of evidence, but is a verdict without a particle of evidence to support it.

The ground on which the county judge affirmed the judgment of the justice was that there was evidence of a subsequent ratification of the bargain by the plaintiff. The evidence was that the plaintiff asked the defendant how he traded, to which the latter replied, "*pretty much as you and I talked*, a little different, and if you are not suited with the trade we will trade back this evening." Upon this the parties drank together and parted. This answer of the defendant was untrue. The trade was made, not as the plaintiff had proposed, but as the defendant had offered, and which offer the plaintiff had expressly rejected. If the defendant had truly disclosed the terms of the bargain, when he was asked, and the plaintiff had silently acquiesced, it would have presented quite a different question. No doctrine is better settled, on principle and authority, than this, that the ratification of the act of an agent previously unauthorized, must, in order to bind the principal, be with a full knowledge of all the material facts. If the material facts be either suppressed or unknown, the ratification is invalid, because founded on mistake or fraud. (*Paley on Agency by Dun.* 172, n. *Owing v Hull*, 9 *Peters*, 608.) The answer of the defendant to the plaintiff's inquiry was untrue, and was well calculated, and doubtless intended, to prevent further inquiry. The defendant had agreed with the agent to conceal from the plaintiff the departure from his instructions. It would be a reproach to the law to uphold such a fraud. There was no dispute about facts. The jury drew an erroneous conclusion from the testimony. They must have held that sub-

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sequent assent to the trade was a ratification of the bargain, whether the plaintiff knew of its terms or not.

The judgment of the county court and of the justice must be reversed.

[ST. LAWRENCE GENERAL TERM, September 1, 1851. *Willard, Hand and Cady, Justices.*]

CORNELL and BROKAN, overseers of the poor of the town of
Ovid, vs. BENNETT.

An omission in a summons issued by a justice of the peace, to state the *plea* in which the defendant is to answer the plaintiff, or the *nature of the claim* alleged by the plaintiff, is no cause for reversing a judgment rendered by the justice. (a)

Nor is it a sufficient cause for the reversal of a judgment, rendered by a justice of the peace on the return of a summons, that the justice did not appear at the place named in the summons for the trial, until half past three o'clock, when the summons was returnable at one o'clock P. M., if the defendant was present at the trial, although he did not appear in the suit.

THIS was an appeal from a judgment rendered by the county court of Seneca county, upon an appeal from a judgment of a

(a) This question came before the justices of the 4th district, in the case of *Park v. Hitchcock and Bilety*, at the general term in Montgomery county in May, 1851, and was decided in the same way; Willard, Hand and Cady, justices. It was an appeal from a judgment of the Washington county court, affirming that of a justice in favor of the plaintiff. The summons issued by the justice required the defendants to appear, &c. "to answer the complaint of Timothy Park, to his damage one hundred dollars." The defendant appeared by attorney, for the purpose of objecting to the proceedings, which he moved to quash, for the reason, among others, that the summons *did not state the alleged cause of action*, and was therefore a nullity. The opinion of the supreme court was delivered by

HAND, J. "It was also objected, that it did not appear by the summons, that the court had any jurisdiction of the cause; nor did it state the alleged cause of action. The revised statutes required that the summons command the defendant to appear &c. to 'answer the plaintiff in the plea in the same summons to be mentioned.' (2 R. S. 228, § 14.) Under this statute the

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justice of the peace. It appeared by the return of the justice, that the summons, by which the suit was commenced, was as follows :

" Seneca county, ss. To any constable in the said county, greeting. These are, in the name of the people of the state of New-York, to command you to summon Charles Bennett to appear before me the undersigned, a justice of the peace of said county, at my office in the town of Ovid in the said county, on the 2d day of September, 1850, at one o'clock in the afternoon, to answer John I. Cornell and Peter A. Brokan, overseers of the poor of the town of Ovid, to their damage one hundred dollars or under; and have you then and there this precept.

summons usually mentioned the kind of action in which the plaintiff intended to implead the defendant. The language was the same in the former acts. (*See* 1 *K. & R.* 491; 5 *Web. L.* 376; 1 *R. L.* 388; *the \$50 act of 1824*, § 3.) And yet, declaring for a cause of action differing from that stated in the summons, was held to be no error. (*Baker v. Dunbolton*, 10 *John.* 240. *Borne v. Ferne*, 16 *Id.* 161. 1 *Cowen's Tr.* 506.) 'Plea' is a generic collective term, comprehending all the allegations of the parties; but, in the summons, it professed to inform the defendant to what kind of action or complaint he was required to answer, although the specific wrong or claim did not appear until the declaration was filed. (*Gould on Pleadings*, 267.) Forms of actions are now abolished. (*Code*, § 84 *sub.* 15, § 69.) Of course, the summons can not give the name of any action, or state it to be of any plea. The business of the summons is to notify the defendant that he is sued, and in what court, and by and with whom, and that he must answer the complain', as it is now called, and when and where, &c. This is all that should be required in a justice's court. In courts of record, it also informs him, in some cases, of the amount for which judgment will be taken, and in others that the plaintiff will apply to the court for judgment. But in justices' courts, the plaintiff must state and prove his grievance in open court, in all cases. It would be very embarrassing, and too much, to require that the summons should contain the complaint. Undoubtedly, it must not show the court has no jurisdiction. (*Yager v. Hannah*, 6 *Hill*, 681.) But otherwise, under the former system, the plea could not have been a jurisdictional matter, where it did not actually show want of jurisdiction; for the justice could not try many actions of a plea of trespass, trespass on the case, &c. No benefit would be derived by stating therein to what class the cause of action belonged. (*Code*, § 167. 16 *John.* 162. 6 *Hill*, 681, 684.) A different opinion, it seems, has obtained in some of our local courts. (2 *Code Rep.* 68. 140.) But in this I have not been able to concur."

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Given under my hand, at the town aforesaid, the 27th day of August, 1850. JOSEPH DUNLAP, J. P."

The return stated that "at the time, one-half after three o'clock P. M. the justice arrived and called the suit," when the plaintiffs appeared; "the defendant was present but did not answer;" that the plaintiff declared upon a promissory note; and that "on the trial of the said cause, Charles G. Bennett, a witness sworn on the part of the plaintiffs, says the hand-writing of the note is his," &c. After further testimony, in respect to the note, the justice rendered a judgment in favor of the plaintiffs, which was reversed by the county court.

John E. Seeley, for the plaintiff.

Thomas Finnegan, for the defendant.

By the Court, T. R. STRONG, J. The contents of a summons for the commencement of a suit before a justice of the peace, are prescribed by 2 R. S. 228, § 14. It must require that the defendant be summoned "to answer the plaintiff, in the plea in the same summons to be mentioned." Before the code, it was the practice to designate the plea in the summons, by simply stating a form of action, as "trespass," or "trespass on the case;" but as all forms of action are abolished by the code, § 69, and § 64, sub. 15, it must now be done in some other manner. It would doubtless be a sufficient designation, to state briefly and generally, in any form, the nature of the claim alledged by the plaintiff. I do not think the provision that the plea must be mentioned, is repealed by the abolition of the forms of actions; the existence of such forms is not at all necessary to a compliance with it. But I am satisfied that an omission to comply with the provision, is no cause for reversing a judgment. The defect is a mere technical and formal one, in no way prejudicial to the substantial rights of a defendant. When it is made the subject of objection before the justice, he should amend the process, which he has ample power to do. (*Brace v. Benson*, 10 Wend. 213. *Near v. Van Alstyne*, 14 Id. 230. *Arnold v. Maltby*, 4

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Denio, 498.) But if he overrules the objection, without amendment, and gives judgment for the plaintiff, it can not be reversed on account of that defect. By § 366 of the code, upon the hearing of an appeal from the judgment of a justice, "the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits." Under this provision, defects like that in question must be overlooked. (*See also* 2. *R. S.* 424, 5, § 7; *Bowen v. Ferne*, 16 *John.* 161; *Cowen's Treatise*, 2d ed. 458; 1 *R. L. of* 1813, 387, § 2; *Laws of* 1824, p. 280, § 2.)

The return of the justice sufficiently shows, independent of the direct statement therein to that effect, that the defendant was present at the trial. A person of the same name was sworn as a witness, on the part of the plaintiffs, and testified "that the hand-writing of the note was his." The fair inference is that he was the defendant. (*Cowen & Hill's Notes* 1301, and cases cited.) And if the defendant was present, the case of *Barber v. Parker*, (11 *Wend.* 51,) is directly in point, that the judgment of the justice was not erroneous, because the justice did not appear at the place appointed for the trial, until after the expiration of one hour from the time specified in the summons. It is true that more time had elapsed, after the hour, in this case, when the suit was called, than in that cited; but I think the doctrine of that case may properly be held to embrace this. The defendant willfully abandoned the suit. He should have answered when it was called, and if an adjournment was essential, applied for it. (*See also Baldwin v. Carter*, 15 *John.* 496; *Wilcox v. Clement*, 4 *Denio*, 160.)

The judgment of the county court must be reversed, and that of the justice affirmed.

[MONROE GENERAL TERM, September 6, 1852. *Selden, Johnson and T. R. Strong*, Justices.]

MEAD, respondent, vs. MEAD and MEAD, appellants.

Whether, upon the reversal of a decree of a surrogate, admitting an instrument to record and probate, as a will, this court is limited in rendering judgment, to a reversal of the surrogate's decree, with an award of costs, or may go further, and adjudge that the instrument was not duly executed as a will, and is therefore null and void? *Quære.*

Assuming that it has power to make such a disposition of the case as the surrogate ought to have made, it is not bound to do so, but may exercise a discretion on the subject. It is only when it is apparent that all the evidence, which exists in the case, has been produced, or there is some special reasons for it, that the court should go beyond a judgment of reversal, with a direction as to costs.

When there is no conflict in the testimony before the surrogate, in reference to the execution of a will, the question whether it was duly executed is one of law.

THIS case came before the court by appeal from a decree or order of the surrogate of the county of Cayuga, admitting to record and probate, an instrument propounded as the will of Israel Mead, deceased. Upon the hearing of the appeal, this court directed a reversal of the decision of the surrogate, on the ground that there was no evidence that the deceased subscribed the instrument in question, in the presence of each of the attesting witnesses, or acknowledged to each, that he subscribed the same; and further directed that costs should be allowed to the appellants, to be paid out of the estate of the deceased. The attorney for the appellants prepared and caused to be entered, a judgment, declaring after the ordinary recital, that "it is ordered and adjudged that the said decree or order of the said surrogate be, and the same is hereby reversed, annulled, and altogether held for nothing. And it is further ordered and adjudged, that the said instrument in writing, so propounded as and for the last will and testament of Israel Mead, deceased, was not executed and attested in the manner prescribed by law for the execution and attestation of last wills and testaments. And it is further adjudged, that the said instrument in writing is utterly null and void, as and for the last will and testament of the said Israel Mead. And it is further ordered, that the costs of the appellants in this court, be paid out of the estate of the decedent, when letters of administration shall have been granted thereon."

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A motion was now made on the part of the respondent, upon the papers in the cause, and on an affidavit of his counsel, for a modification of the judgment, by striking out all beyond a reversal of the decree of the surrogate, or for such other or further relief as the court might see fit to grant.

George Rathbun, for the respondent.

P. G. Clark, for the appellants.

By the Court, T. R. STRONG, J. The revised statutes, (vol. 2, p. 66, §§ 55 to 62 inclusive, and page 608, §§ 90 to 98 inclusive,) authorized an appeal to be made to a circuit judge from the decision of a surrogate, admitting or refusing to admit, a will to record or probate, and prescribed the proceedings to be taken on the appeal. Among other things, they provided that the circuit judge should affirm or reverse the decision of the surrogate as should be just. If he affirmed the decision, he was to award costs, to be paid by the party appealing, either personally or out of the estate of the deceased, as he should direct. If he reversed the decision upon a question of law, costs were in like manner to be awarded against the party maintaining the decision of the surrogate, either personally or out of the estate of the deceased. Such affirmance, or such reversal upon a question of law, with the award of costs, was to be certified to the surrogate, who was to enforce the payment of the costs. If the circuit judge reversed the decision of the surrogate on a question of fact, it was directed that an issue was to be made up to try the questions arising upon the application to prove the will. From the decision of the circuit judge, when no issue was directed, an appeal lay to the court of chancery, which court was directed to prescribe by rule the course of practice thereon. (2 R. S. 609, § 100, p. 611, § 120.) It will be seen by this brief statement, that under the revised statutes, the power of the circuit judge, in respect to the decision to be made by him, was limited to a reversal or affirmance of the decision of the surrogate, with costs; that when the reversal was upon a ques-

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tion of law, the reversal was to be certified to the surrogate, and when upon a question of fact, an issue was to be made up; and that he could make no other or further decision. (*See Stewart's Executors v. Lispenard*, 26 Wend. 318 to 324.) But the power of the court of chancery, upon appeal from the decision of the circuit judge, was not thus limited; and that court undoubtedly, by virtue of its general jurisdiction, and having the whole case before it by the appeal, had authority not only to reverse or affirm the decision of the circuit judge, and that of the surrogate, but upon reversing the surrogate's decree, to make such a decree as the surrogate ought to have made. It had power to declare the instrument valid or void as a will, and to adjudge that it be or be not admitted to probate. (*Stewart's executors v. Lispenard*, above cited. *Brinckerhoof v. Remsen*, 8 Paige, 502; *same case on appeal*, 26 Wend. 325, 340. *Chaffee v. Baptist Missionary Convention*, 10 Paige, 85, 92, 93.) Under our present judicial system, the appeal which was to be made to the circuit judge, by the provisions above referred to, is to be made to this court. (*Judiciary act, Laws of 1847, p. 324, § 17.*) And by the same section these provisions are to apply to such appeal, so far as the same are applicable and consistent with the constitution and the provisions of that act. The appeal in the present case was made under those provisions, and the section of the judiciary act above given. This court had, therefore, all the powers in relation to the appeal, which belonged to a circuit judge upon a like appeal to him, and might make the same decision which he could have made. Perhaps also, it had the same powers upon the appeal, which belonged to the court of chancery upon appeal from the decision of a circuit judge, pursuant to the aforesaid provisions, and might finally determine the case.

By the 6th article of the constitution, and the 16th section of the judiciary act, (*Laws of 1847, p. 323*), this court is invested with the powers and jurisdiction which were possessed by the court of chancery; and all laws relating to that court, its jurisdiction, powers and duties, are applicable to this court, its powers and duties, so far as the same can be so applied, and are

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consistent with the constitution and said act. The effect of the constitution and judiciary act may be to unite in this court, in respect to such an appeal, all the powers of the circuit judge upon appeal from the surrogate, and of the court of chancery upon appeal from the circuit judge. Unless this effect has been produced, it is very clear that the judgment in this case, as entered, goes further than was authorized. It is not necessary now to decide the question suggested, as to the extent of the powers of the court in such a case; for assuming that it had power to give such a judgment as has been entered in the present case, it was not required to go that length. It might have stopped with a reversal and an award of costs. Whether it would give a judgment more extensive than that, rested entirely within its discretion. That is the extent to which a circuit judge could have gone, and I see nothing in this case which calls upon this court to go further. In my opinion it would not be a sound exercise of discretion to do so. If the respondent has, as is alleged in the affidavit upon which the motion in part rests, further evidence, no reason is perceived why he should be concluded from commencing anew before the surrogate, and in that way having a new trial. It is only when it is apparent that all the evidence which exists in the case has been produced, or there is some special reason for it, that the court should finally dispose of the case.

It is proper to remark that this was not a case for directing an issue. The question presented upon the appeal being one of law purely—there was upon the evidence no question of fact. (*See cases before cited.*)

The judgment must therefore be limited to a reversal of the decree of the surrogate, with an award of costs to the appellants, and must be modified accordingly.

No costs are allowed to either party on this motion.

[MONROE GENERAL TERM, September 6, 1852. *Selden, Johnson and T. R. Strong, Justices.*]

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A

ACTION.

1. When the question involved is one of "*common or general interest*," the action may be brought by one or more, for the benefit of all who have such common or general interest, without showing that the parties are very numerous, or that it would be impracticable to bring them all before the court. *McKenzie v. L'Amoureux*, 516

2. The provision of the code, declaring that when the parties are very numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole, applies indiscriminately to all actions, whether they involve questions of common interest or not. *ib*

See **BILLS OF EXCHANGE, 2.**
EXECUTORS AND ADMINISTRATORS,
 5, 6.
LEGACY AND LEGATEE
POSTMASTER.

AGREEMENT.

1. Where two instruments are executed at the same time, between the same parties, and relating to the same subject matter, they are to be construed together, and considered as forming but one contract or agreement. *Hanford v. Rogers*, 18
2. Accordingly, where, in consideration of \$204, paid by the plaintiffs to the defendant, the latter assigned a bond and mortgage to the

former, and covenanted that \$204 and interest was due thereon, and by an indorsement on the bond, executed at the same time, guaranteed the payment of the bond when due, *held* that the assignment and the guaranty were to be regarded as one instrument, and that the plaintiffs could recover upon the guaranty, although it was not under seal, and no consideration was expressed under it. *ib*

3. The plaintiff and defendant bargained respecting the sale, by the former to the latter, of a quantity of lumber, piled apart from other lumber, on a dock and in view of the parties at the time of the bargain, and which had before that time been measured and inspected. The parties having agreed as to the price, the plaintiff said to the defendant, "*the lumber is yours*;" "*get the inspector's bill and take it to H., and he will pay you the amount.*" This was done the next day, and payment was refused. The price was over fifty dollars, and the plaintiff sued the defendant therefor in a justice's court; whereupon before the trial, R., the attorney for the plaintiff, and H. acting as attorney for the defendant, but without authority from the latter, settled the suit for forty-one dollars, and H. gave his check, post-dated one month, to R., on a bank, for the amount, and R. gave a receipt in full as for so much money. The defendant, with full knowledge of this settlement, took possession of the lumber and carried it to market. *Held*, 1. That the taking possession of the lumber by the defendant was a completion of the purchase, and obviated the objection of the statute of frauds.

2. That it was a ratification of the act of his agent, by subsequent assent. *Houston v. Shindler*, 86
4. The check having been dishonored by the bank, for want of funds, and H. the drawer being insolvent and having obtained his discharge in bankruptcy, *Held further*, that on surrendering the check, the plaintiff was entitled to recover for the value of the lumber, as for goods sold. *ib*
5. Where a person sells to superintendents of the poor, provisions for the poor-house, upon an agreement that it is to be a cash sale, or if an order shall be given that it shall answer as cash, whereupon the superintendents give him an order upon the treasurer of the county, for the amount, and upon presentment of such order to the treasurer payment is refused for want of funds, the vendor is remitted to his original right of action against the superintendents, and may recover of them the value of the supplies. *Paddock v. Symonds*, 117
6. In such a case the county is liable on the contract made by its authorized agents in the business specially committed to them by the statute: and that liability is to be enforced in a suit against the superintendents. *ib*
7. O. H. M. & W. M., being partners in the practice of medicine, on the 8th of Oct. 1849, entered into an agreement under seal by which W. M. granted and sold to O. H. M. the jars, bottles and other furniture belonging to the office, except the stove, at first cost, and the stove for what it was worth, and the medicine in the office for what it should be appraised at, &c. W. M. for and in consideration of the above sale and of the sum of \$100 to him paid by O. H. M., bound himself "in the sum of \$500 liquidated damages, not to practice medicine in the village of S., or town of S. for five years" from the date of the agreement. O. H. M. agreed to buy the furniture, &c. and to pay the prices specified in the agreement. Another instrument, of the same date, under seal, was executed by the parties, by which O. H. M. sold and conveyed to W. M. the equal undivided one-third part of all the accounts, notes, debts, &c. due to the firm, and W. M. promised to pay to O. H. M. fifty cents on the dollar, on the said one-third of the demands, &c. These instruments, it was alleged, were executed and delivered at the same time, and related to the same subject matter. *Held* that there was a sufficient consideration for the contract, and that such agreement was not against public policy, although in restraint of trade; the extent of territory and the length of time to which the restraint was limited not being unreasonable. *Mott v. Mott*, 127
8. *Held also*, that for a breach of the covenant by W. M. before the death of O. H. M. an action could be maintained by the personal representative of the latter. *ib*
9. *Held further*, that the sum of \$500, specified in the contract as liquidated damages, was not a penalty, but that upon a breach of the covenant on the part of W. M. not to practice medicine, that sum was recoverable. *ib*
10. Where the memorandum of a contract of sale of merchandise, which was signed by a broker as the agent of the parties, contained a provision that the notes to be given by the purchasers should be made *satisfactory to the sellers*; *HELD* that the obvious construction of the contract was, that the delivery of the merchandise and the giving of the notes were to be simultaneous acts, and each was to be the condition of the other. *Draper v. Jones*, 263
11. Such a contract differs from ordinary contracts where the sale is for cash or notes; a further act being necessary on the part of the vendors, before the vendees will have it in their power to fulfill the contract; viz. the notes to be given are to be satisfactory to the vendors. This provision will render a sale clearly and unequivocally conditional. *ib*
12. Prior to, and on the 18th of December, 1846, the plaintiff was a joint owner, with W. & B., of a quantity of clover seed. On that day an arrangement was made between the

parties by which it was agreed that the plaintiff should hold on to the clover seed, (which was then stored at B. in his name and for his account, and subject to his order,) and sell it as he saw fit, if necessary to pay certain drafts which had been drawn by the plaintiff upon W. & B. to pay for the clover seed, and which drafts were then due and unpaid, W. & B. having failed in business. Subsequent to this arrangement W. & B. transferred the clover seed to the defendant, in payment of individual debts owing by them to him; and he obtained possession of the property. In an action of trover, for the clover seed, brought by the plaintiff against the defendant; *Held*, 1. That on the failure of W. & B. the plaintiff had a right to insist upon the application of the property to the payment of the debts contracted in its purchase; which right might be secured by an arrangement between the parties. 2. That the joint owners having, by such arrangement, placed the property in the custody of the plaintiff, for the purpose of paying such debts, and having advised the creditors of the arrangement, they could not afterwards rescind the same, without the consent of all concerned. 3. That the defendant, having taken the assignment from W. & B. with full knowledge of the legal and equitable rights of the plaintiff, was not, as against him, a *bona fide* purchaser of the property, or of the interest of W. & B. therein; but took his assignment subject to the prior rights of the plaintiff, and was liable to him in an action of trover. *Beecher v. Bennett*, 874

18. By an agreement between L. and the plaintiffs, L. agreed to charter to the plaintiffs the canal boat Jeffersonian for the sum of \$500, from the opening of canal navigation in 1847 until its close. L. also agreed to run and man said boat at \$110 per month and 10 cents per mile for towing, night and day, and to pay all other running expenses, tolls excepted. The boat was to be kept in good running order, free of expense to the plaintiffs, and should she be lost, burnt or otherwise disabled, the charter was to be paid for as *pro rata* for the whole season. In case L. should sell the boat he was to be

at liberty to transfer the charter to the new boat he might obtain in exchange. *Held* that the true construction of the agreement was that it did not transfer to the plaintiffs the ownership of the boat, during the season of canal navigation: but that L. remained the owner, and therefore might sell the boat; and that upon such a sale being made by him the right to the freight subsequently earned passed to the purchaser. *Williams v. Johnson*, 501

14. *Held also*, that the purchaser had a lien upon goods of the plaintiffs transported in the boat after its purchase by him, for freight; and that the remedy of the plaintiffs was not by an action of replevin, for such goods, but by an action of covenant against L., upon the charter-party. *ib*

See MECHANIC'S LIEN LAW.
PARTNERSHIP, 1.
USURY, 1, 5.

APPEAL.

1. It is too late to raise, in the appellate court, an objection not made in the court below. The objection, if it in reality existed, might have been obviated if mentioned at the trial. *Crooke v. Mali*, 205
2. The appellate court will intend that every thing necessary to sustain the verdict was proved, unless the omission was taken advantage of by exception in the court below. *ib*
3. Where a defendant in a justice's court, on the decision of a demurrer against him, puts in an answer, he thereby waives the demurrer; and the supreme court, on appeal, can not review the decision of the justice in overruling the demurrer. *Irvine v. Forbes*, 587

APPLICATION OF PAYMENTS.

1. Where commission merchants, by direction of their principals, received and sold the goods of the latter, and applied the proceeds to the satisfaction of advances made by

the commission merchants, which were alledged to be usurious, and the accounts of sales and of the application of the proceeds were delivered to their principals, and acquiesced in for over two years; *Held* that the payment must be regarded as having been made by the principals themselves. *Seymour v. Marvin*, 80

2. *Held also*, that when the moneys were applied to satisfy the usurious debt and the debtors acquiesced in, and ratified the payment, that act became a voluntary payment and satisfaction by the debtors, and extinguished the debt. That after that act there was no *locus pamtentis* for the debtors. *ib*

3. A debtor has the right of saying to what account any given payment shall be applied. When he fails to make a designation, the creditor may apply it as he pleases. *ib*

4. And where a creditor, after having applied a payment made by his debtor to a particular debt, serves on the debtor an account current showing how the payment was applied, which is acquiesced in by the latter, such application will be conclusive upon him. *ib*

See LANDLORD AND TENANT.

ARREST.

1. Section 179 of the code of procedure allows an arrest, when the defendant has been guilty of a fraud in contracting the debt, for which the action is brought; and by section 188 the order for arrest may be made at any time before judgment. It is to be made when it appears on affidavit, that a sufficient cause of action exists, and that the case is one of those mentioned in section 179. *Barker v. Russell*, 803

2. An execution may be issued against the person of a defendant who has been guilty of a fraud in contracting the debt on which the action was brought; although the summons in that action, be, in form, on contract, for money only, the complaint in contract only, not noticing the fraud on which the order for the ar-

rest of the defendant was grounded; and the judgment in accordance with the complaint. *ib*

ASSESSMENT.

See JUDGMENT, 5, 6, 7, 8.

ASSIGNMENT.

See DEBTOR AND CREDITOR, 4 to 13.
LEASE.

ASSIGNOR AND ASSIGNEE.

See WITNESS, 4.

ATTACHMENT.

1. S., a constable, having in his hands an execution against the property of M., levied on a horse, and advertised it for sale. Prior to the day of sale, an attachment came to his hands, against the property of M., by virtue of which he attached the same horse. The property was then sold on the first execution, and a sufficient sum was raised to pay the first execution, and leave a surplus to pay the amount due in the attachment suit. After the sale of the horse, judgment was obtained in the attachment suit, and execution issued thereon to S., who levied on the same money which he had received on the sale of the horse. He sold such money, and applied the avails to satisfy the execution. *Held* that the lien of the attachment, on the horse, by operation of law became transferred, after the sale, to the surplus money in the hands of S. *Wheeler v. Smith*, 845

2. *Held also*, that such surplus money in the hands of S. was the money of M., and was liable to levy and sale on the subsequent execution against M. which came to the hands of S. *ib*

3. Upon an application to a justice of the peace for an *attachment* against the defendant, there must be an affidavit, proving the grounds on which the application is founded, in all

cases, not excepting that of a non-resident. *Van Kirk v. Wilds*, 520

4. If an affidavit states that the plaintiff has a debt against the defendant, to a specified amount, arising upon contract, and that the defendant is a non-resident of the county, it is enough to warrant the justice in issuing an attachment. *ib.*

5. Where a constable returns, upon an attachment, that he has delivered to each of the defendants, personally, a copy of the attachment and inventory, this is *prima facie* sufficient, although he does not state that the copies served were certified by him. *ib.*

6. Form and validity of attachments issued by justices of the peace. *ib.*

See PUBLIC OFFICERS, 3.

ATTORNEY.

See BANKS, 3, 4, 5, 7.

PRINCIPAL AND AGENT, 3.

B

BAIL.

1. In a suit against bail, in the supreme court, that court may grant relief to the bail, although the original action was in another court; and may allow a temporary stay of proceedings, to enable them to surrender their principal. *Barker v. Russell*, 303

2. Bail are not estopped from such equitable relief, on account of any delay arising from a mistake of a new law, in a matter in which counsel and judges have differed. *ib.*

BANKRUPT.

1. Although in pleading a bankrupt's discharge by a district court of the United States, the facts on which jurisdiction depends must be averred, yet when the discharge is offered in evidence, jurisdiction will be presumed, until the contrary appears. *Morse v. Cloyes*, 100

2. Although the bankrupt act makes the certificate of discharge evidence only when the discharge has been "duly granted," yet it need not first be shown that the requirements of the act have been complied with. The law will presume that the discharge was duly granted, until the contrary appears. *ib.*

3. In an action of trespass on the case, where the defendant relies upon his discharge under the bankrupt law, and the plaintiffs attempt to avoid the discharge, on the ground of concealment, and omissions, in the petition and schedules, and irregularities in the proceedings on behalf of the bankrupt, there is no impropriety in the defendant's showing that the plaintiffs knew of all those matters, at the time that the bankrupt's proceedings were pending; and that they, in fact, raised the same objections in the course of those proceedings. Neither is there any impropriety in the defendant's showing that those objections were not considered available in opposition to the granting of the decree of bankruptcy. *Lyon v. Marshall*, 241

4. Where, in such a case, the judge, in his charge to the jury, stated that the alleged omissions in the defendant's petition and schedules, in order to be sufficient to impeach the discharge, must be willful and fraudulent, instead of saying that they must be willful; but in a subsequent part of his charge, he laid down the rule that to avoid a discharge in bankruptcy, it must appear that the defendant has committed a fraud, or willfully concealed his property; and the exception to the charge was general, and not to any particular part: Held, that even if exceptions had been taken to each particular part of the charge, they could not be sustained; that the word *fraudulent*, was, evidently, not intended to mean any thing more than willful, and that taking the whole charge together, the jury must have so understood it. *ib.*

5. A person applying for the benefit of the bankrupt act, may, without committing a fraud, make a reasonable compensation to counsel for the purpose of defraying the ex-

penses of his discharge; otherwise the act could be of no avail to him. And when he does part with his property for that purpose, he can not be said to conceal it, if he omits to set forth such property in his petition. He has nothing which he can conceal. *ib*

See PLEADING, 1.
WITNESS, 1, 2.

BANKS.

1. The sale, by a bank, of a quantity of butter, which it has received in settlement of a debt due to it, is no violation of the provision in its charter, that it shall not directly or indirectly deal or trade in buying or selling any goods, wares, merchandise or commodities whatsoever, unless in selling the same when truly pledged by way of security for debts due to the said corporation. *The Sackets Harbor Bank v. Lewis County Bank*, 218

2. And the purchase of the butter, by another bank, having a similar restrictive clause in its charter, it appearing to be an isolated transaction of buying on the part of such bank, is not within the restriction which prohibits dealing or trading in buying or selling any goods, &c., but is a lawful transaction. *ib*

3. Where by the terms of the charter of a bank, and of the certificates of stock issued by the bank, its stock can only be transferred on the books of the bank, by the stockholder or his attorney, the bank is under no obligation to permit a transfer to be made to a person claiming to be the assignee of a certificate, on the presentation of such certificate with an assignment and power of attorney executed by the original holder, in *blank*, no person being named or specified as the assignee or attorney. *Dunn v. Commercial Bank of Buffalo*, 580

4. Nor can an action of assumpsit be maintained, against the bank, for refusing to permit such transfer, without proof by the plaintiff that he had purchased the certificate, and was the owner thereof. *ib*

5. A person purchasing stock and taking an assignment of the certificate, executed in *blank*, is authorized to write in his own name as assignee of the stock, and such name as he chooses, as the attorney to make the transfers. But the naked possession of the certificate and *blank* assignment and power of attorney is no evidence of title. *ib*

6. Although a bank may have authority to *permit* a transfer of stock to be made, upon its books, it has no right to *make* the transfer, unless empowered by the original holder of its certificates, or by the assignee thereof. *ib*

7. A power of attorney, executed by the assignee of a certificate, authorizing the attorney to ask, demand, and require of the proper officers of the bank to assign and transfer into the name of the assignee, upon their books, the shares mentioned in the certificate, confers no authority upon the attorney, or upon the bank, to make the transfer. *ib*

BILLS OF EXCHANGE.

1. The plaintiff, a resident of this state, drew five bills of exchange upon G. who resided in Boston, payable to the order of the defendant, which were accepted by G. and when they became due they were protested for non-payment. G. was afterwards discharged from his debts, under the insolvent laws of Massachusetts; the defendant proving these bills of exchange before the officer upon those proceedings, and accepting a dividend from G.'s estate. The defendant recovered a judgment against the plaintiff upon two of said bills of exchange, as the drawer thereof, and commenced another suit against him, to recover the amount of the other three bills. On a complaint praying that the defendant might be restrained from collecting the said judgment, and from the further prosecution of the second suit; *Held*, on demurrer, 1. That the discharge of G., the acceptor, would have been no bar to an action by the defendant as holder, or the plaintiff as drawer, if the defendant had not voluntarily proved its demand, and accepted a divi-

dend out of G.'s estate. 2. That the proving of the bills, by the defendant, and accepting a dividend from the acceptor's estate, rendered the defendant a party to the insolvent proceedings, and discharged the liability of the acceptor, upon those bills. 3. That the defendant, by making such proof, and becoming a party to those proceedings, had precluded itself, and any person who might derive title to said bills, from suing the acceptor thereon, and had deprived the plaintiff of any right of action or remedy over against G., the acceptor, if he should pay, or be compelled to pay, or take up, such bills, as the drawer thereof; which right of action would otherwise have remained unimpaired. 4. That such act of the defendant operated, or might operate, to the prejudice or injury of the plaintiff, because he was deprived of the right to collect such bills out of the future acquisitions of the acceptor. That he consequently had a good defense to the bills of exchange. 5. That such defense might be made in the suits brought upon the bills of exchange, and that it should be there made, and not by an application to this court for affirmative relief, either against the judgment, or bills of exchange in suit. *Gardner v. Oliver Lee & Co.'s Bank*, 558

2. A party has now no right to commence an action, against one holding a note or bill against him, to determine the holder's right thereto, or to compel the cancellation thereof, where such right did not exist before the new system of pleading was adopted, or before courts of law and equity were blended together and held by the same judges. *ib*

BONA FIDE PURCHASER.

See JUDGMENT, 4.

BOND.

See DEPUTY SHERIFF, 5.

C

CANALS.

1. In an action of trespass, for diverting water from the plaintiffs' mill,

the defendant, by giving evidence tending to show title to the *locus in quo* in the state, is not precluded, as by estoppel, from proving that the water was taken in pursuance of the laws of the state, by the direction of a canal commissioner, for a temporary supply of water for the state canal. *Walrath v. Barton*, 382

2. A superintendent of a canal may justify taking the waters of a stream, for the temporary use of the canal, in pursuance of the directions of a canal commissioner, although at the time of diverting the water he did not claim to act in obedience to the directions of the canal commissioner, and to take the water as a temporary and not as a permanent appropriation. *ib*

CARRIER.

See WAREHOUSEMAN.

CASES APPROVED OR OVERRULED.

1. The decision of the court of appeals in *Barney v. Griffin*, (2 Comst. 365,) to the effect that an assignment of his estate, by an insolvent debtor, for the benefit of creditors, which confers upon the assignees an express authority to sell on credit, is void, approved. *Whitney v. Kroues*, 198
2. The case of *Gay v. Ballou*, (4 Wend. 403,) so far as it holds that a stepson is liable either upon an implied promise, or an express promise during his minority, to pay for necessities furnished by his step-father, must be considered as overruled. *Sharp v. Cropsey*, 224

CHARGE.

1. Where a testator directs that all his just debts and funeral expenses shall be paid by his executors, the charge is confined to property given to the executors. And if there is a devise of land to them, such land is chargeable with debts, unless otherwise specifically and entirely ap-

propriated by the will. *Buckley v. Buckley*, 43

2. Where a testator, by the residuary clause of his will, gives all the rest and residue of his estate and effects, real and personal, not therein otherwise effectually disposed of, after payment of his debts, legacies, funeral expenses, and other charges therein authorized, to his daughter, this creates a charge upon the *residuum*, in case there is a deficiency of personal property. *ib*

3. A charge merely, does not alter the rights of the parties to the realty, until enforced. Nor does a devise of lands in trust to sell and pay debts and legacies, if the devisee can not receive the rents and profits. Much less does a mere power to sell. *ib*

CHARTER PARTY.

See AGREEMENT, 13, 14.

CODE.

See ACTION, 2.
COSTS, 2.

COMPUTATION OF TIME.

1. In matters of *practice*, merely, the day on which any rule is entered, or order, notice, pleading or paper is served, is to be excluded in the computation of time for complying with the exigency of such rule, order, &c.; and the day on which a compliance therewith is required must be included, except where it falls on a *Sunday*; in which case the party has the next day to comply therewith. *Bissell v. Bissell*, 96
2. But in respect to the construction of *statutes*, the rule is otherwise, in this state. Accordingly where under the statute requiring judgments before justices of the peace to be rendered within four days after the submission of the cause, a cause was submitted to a justice on the 28th of June, and judgment was rendered on Monday, the 8d day of

July following; *Held* that the same was void, as not being entered in season. *ib*

CONSIDERATION.

The consideration of a receipt is open to explanation. *Houston v. Skindler*, 86

See GUARANTY, 1, 2, 4.
PROMISSORY NOTES, 3.

CONSTABLE.

A constable, after he has returned an execution satisfied by a sale, can not annul that return by a supplementary indorsement on the execution that the defendant has sued and recovered for the property. *Ross v. Hicks*, 481

See ATTACHMENT, 1, 5.

CONSTRUCTION OF INSTRUMENTS.

In all instruments of a special character, the general terms which are used must be construed in reference to the particular terms which form the subject matter of the instrument. But the court, in giving a construction, will apply the principle that all instruments must be construed according to the spirit as well as the letter *Taylor v. Harlow*, 232

See DEED.

CORPORATION.

See JUSTICES' COURTS, 6, 7.

COSTS.

1. It is a general rule that a party coming into court to redeem is charged with the costs, though he succeeds in the action. But where the plaintiffs, before bringing their action, tendered the amount due upon the mortgage and any

costs which had been incurred; held that neither party was entitled to costs, as against the other. *King v. Dunz*, 191

2. Under sections 808 and 809 of the code, the people are liable to be charged with an extra allowance for costs in actions brought by them. *The People v. Clarke*, 837

3. An action brought by the attorney general, in the name of the people, in pursuance of the joint resolution of the legislature passed on the 31st of March and on the 10th of April, 1848, for the purpose of testing the validity of the titles of certain landlords to lands mentioned in said resolution, is one of those in which the code permits an extra allowance to be made. *ib*

4. Unsuccessful claimants of surplus moneys arising from a mortgage sale, will be charged with the extra costs occasioned by their claims, where the claim of the successful party is just and equitable, and the amount of the surplus is small, and a large amount of unnecessary costs has been incurred in the litigation of the claims. *Lawton v. Sager*, 849

COUNTY COURT.

See PLANK ROADS, 5, 6.

D

DAMAGES.

1. In an action on the case for damages to the plaintiffs' saw mill and other property, occasioned by the act of the defendant in constructing a dam and dike below such mill, and thereby causing the water to flow back upon the mill, and rendering it incapable of being used, the plaintiffs are only entitled to recover the value of the use of their mill during the time they were necessarily deprived of the use of it, and the amount which it was permanently diminished in value by the erection of the dam. They can not recover the amount of a loss upon saw logs on hand at the time of the injury, sustained either in

consequence of a deterioration in their value, or by a depression in the market price. *Walrath v. Redfeld*, 868

2. In such an action, the onus of showing that the entire damages claimed resulted necessarily from the act of the defendant is upon the plaintiffs. *ib*

3. The damages in respect to the saw logs must be averred in the declaration, and proved upon the trial, and they are too speculative, uncertain, remote and contingent, to be allowed, even upon proof that the plaintiffs could not, by the use of ordinary diligence, have procured the logs to be sawed, elsewhere, and could not have disposed of them before sawing. *ib*

4. In actions of tort, where there has been no willful injury, the plaintiff can only recover the damages necessarily resulting from the act complained of, and he can not conduct in such a manner as to make the damages unnecessarily burdensome. *ib*

See AGREEMENT, 9.

LIQUIDATED DAMAGES.

DEBTOR AND CREDITOR.

1. A person can not sell a debt against himself, to another. *Van Scooter v. Leferts*, 140

2. A debtor has no interest in debts owing by him, which he can transfer. The property and interest in a demand belongs wholly to the creditor, and the debtor has no authority or control over it. *ib*

3. A demand due from a person to himself and another as partners, is, to the extent of his own interest in it, no debt against him. *ib*

4. Accordingly, where a member of a copartnership sold and assigned to another "all his interest in and to the property, goods, wares and merchandise and debts belonging to the firm;" Held that a debt owing by himself to the firm did not pass by the assignment; the "interest" of the assignor being only what remained over and above the amount of his indebtedness to the firm. *ib*

5. An assignment of his estate by an insolvent debtor, for the benefit of creditors, which confers upon the assignees an express authority to sell on credit, is void. *Whitney v. Krows*, 198
 6. The decision of the court of appeals, to that effect, in *Griffin v. Barney*, (2 Comst. 365,) approved. *ib*
 7. But a provision authorizing the assignees "to sell and dispose of the property upon such terms and conditions as in their judgment may appear best," &c. and "to convert the same into money," will not be construed as authorizing them to sell on credit. *ib*
 8. The fair construction of such a provision is that the trustees are to exercise their judgment as to the manner of sale, but when they sell they are to receive the money. *ib*
 9. Nor will it render an assignment void to insert in it a provision authorizing the assignees to effect an insurance upon a portion of the assigned property, and to keep good an insurance already existing, upon another portion of the property, so long as in their judgment it shall be necessary. *ib*
 10. Neither will an assignment be vitiated by a provision authorizing the assignees, if they shall deem it necessary, to pay the interest on a mortgage which is a prior lien upon the assigned property, and the principal and interest on another mortgage, if they shall deem it for the interest of the creditors to do so. *ib*
 11. An assignment by copartners, of their individual property, as well as their partnership property, to pay the joint debts of the firm, is not on that account void. *Van Rossum v. Walker*, 237
 12. A prohibition in the assignment, against the assignee's selling on credit, is not, *per se*, evidence of fraud. It may be that such a provision is an unwise one, and one that ought not to be countenanced; and when there are any circumstances which go to show that a forced sale was intended, to the injury of the creditors, it ought to be taken into consideration as an important item of evidence, which, in connection with the other circumstances, would justify the court in setting aside the assignment. But, *it seems*, that this is all the effect which should be given to such a provision. *ib*
 18. A provision contained in such an assignment, for the return of the surplus to the assignors, after the payment of their debts, will not render the assignment void. *ib*
- See APPLICATION OF PAYMENTS.
- DEDICATION.
- See HIGHWAYS.
STREETS, 8.
- DEED.
1. Deeds of bargain and sale between man and man may, to some extent, be explained by showing the intent of the parties; and in some cases if the deed, by reason of fraud or mistake, fails to express the true intent, it may be reformed, and made to express such intent. But a deed of a sheriff can not thus be reformed. If it follows the notice and certificate of sale it can not be in any respect varied, for any reason, or made operative except according to its terms. The inquiry into the intent of the sheriff must be restricted to the terms used, and to the intent which the language of the instrument expresses. *Mason v. White*, 173
 2. Extrinsic circumstances may be resorted to, to explain the terms used in a sheriff's deed, and to locate the premises described therein. But they can only be allowed for the purpose of establishing and carrying out the intent expressed in the deed, and not an intent which the terms of the deed fail to express. *ib*
 8. If, in a deed, there are certain particulars once sufficiently ascertained, which designate the thing intended to be granted, the addition of a circumstance false or mistaken will not frustrate the grant. If there is a certain description of the premises conveyed, and a further

- description is added, it is immaterial whether the superadded description be true or false. *ib*
4. Where land is conveyed by a sheriff, upon a sale by him on execution, and two distinct parcels of land are found equally answering the description contained in the deed, the conveyance will be held inoperative, for the reason that it was intended to pass but one, and it can not be determined which was intended. *ib*
 5. If a parcel of land exists in which the judgment debtor had an interest liable to levy and sale on execution, and which in every particular answers the description of the premises sold, no part which is necessary to a perfect description will be rejected as surplusage, so as to embrace a distinct or different parcel of land, to the exclusion of the one accurately described. *ib*
 6. Where a deed, in describing the premises conveyed, bounds them on one side by lands mentioned as owned by another person—speaking in the present tense—when in fact there is, at the date of the deed, no land owned by such person, in that place, the land *recently* owned by him will be intended, and the deed should receive this construction *ut res magis valeat quam pereat*. *ib*
 7. A sheriff's deed described the land intended to be conveyed as "bounded on the west by the highway leading from A. P.'s to the Erie canal, east by land occupied by J. B. and south by land owned by P. F. W." The premises in dispute were once owned by P. F. W. but were not bounded on the south by any lands that were or ever had been owned by him. But directly north of, and adjoining the premises in dispute, was another parcel of land answering the description in the sheriff's deed in every respect, and in which the judgment debtor had at the time, an interest in right of his wife, liable to be sold on execution. *Held*, 1. That the deed did not embrace the premises in dispute; but that it did include the parcel lying on the north. 2. That if the latter parcel was not included in the deed, then the deed was void for uncertainty. 3. That in the construction of the sheriff's deed every part of the description must be read and satisfied with reasonable certainty, and that no part of it could be rejected for its falsity. *ib*
 8. A deed can only be delivered as an *escrow*, to a third person. If it be intended that it shall not take effect until some subsequent condition shall be performed, or some event shall happen, such condition must be inserted in the deed itself; or else it must not be delivered to the grantee. *Lawton v. Sager*, 849
 9. Whether a deed has been delivered or not is a question of fact, upon which parol evidence is admissible. But whether a deed, when delivered, shall take effect absolutely, or only upon the performance of some condition not expressed therein, can not be determined by parol evidence. *ib*
 10. Where a deed, absolute upon its face, is delivered to the grantee, it takes effect at once. It can not be delivered to take effect upon the happening of a future contingency; for this would be inconsistent with the terms of the instrument itself. *ib*
 11. The mere existence of a deed for more than thirty years, without any proof of accompanying possession, is not enough in any case to authorize it to be read in evidence as an ancient deed, without proof of its execution. *Ridgeley v. Johnson*, 527
- ### DEPUTY SHERIFF.
1. A deputy sheriff is an *officer* within the provisions of the revised statutes relating to the the appointment and resignation of officers. *Gilbert v. Luce*, 91
 2. A deputy sheriff may resign his office, which becomes *ipso facto* vacant by such resignation. *ib*
 3. Such resignation need not be under seal. *ib*
 4. The statute does not leave any option with the sheriff to accept the resignation of his deputy, or not. When such resignation is received by the sheriff, the deputy ceases to

hold his office, and his sureties are not responsible for any acts of his, done thereafter. *ib*

5. The liability of the sureties in a bond given to the sheriff by his deputy, will not be discharged by the sheriff's receiving a new bond from the deputy and continuing him in office, after his resignation; without making any new appointment, or the deputy taking the oath of office anew. *ib*

DESCENT.

1. Where a devisee is the heir of the testator, he will take by descent, and not as purchaser, unless a different estate is given him, or there is a conversion; even if there is a charge upon the realty. *Buckley v. Buckley*, 43
2. Devisees may be liable for the debts of the devisor, but not unless it appears that the personal assets, and the real estate descended, were insufficient to discharge the debt; or that after due proceedings before the surrogate, and at law, the creditor has been unable to recover the debt. *Stuart v. Kissam*, 271

DOWER.

In order to bar the widow of her action for dower, where rent has been assigned with her consent, and accepted by her, it must appear that the rent will endure for her life. *Ellicott v. Mosier*, 574

See EJECTMENT, 3, 4, 5, 6.
FORECLOSURE SUIT.

E

EJECTMENT.

1. Where in an action of ejectment, the plaintiff claims to have obtained the interest of the owner, by his purchase of the premises at a sheriff's sale, that fact may be controverted, either by the judgment debtor or any other person, who is at liberty to show that the interest

of the judgment debtor was not the subject of a sale upon execution, and thus to invalidate the title on which the plaintiff rests his claim. *Bigelow v. Finch*, 498

2. The fact that a defendant in an ejectment suit has taken a quitclaim deed from another, and entered into possession under it, will not estop him from questioning the title of his grantor. *ib*
3. Ejectment to recover dower will lie against a tenant who has an estate or interest less than a freehold, and before dower has been assigned or admeasured. *Ellicott v. Mosier*, 574
4. Such action must be brought against the actual occupant of the premises out of which dower is claimed, if there is any actual occupant. *ib*
5. Where the plaintiff, in her complaint, describes lands in the possession of several tenants, occupying different portions thereof, the defendant occupying but a small part; and the plaintiff claims for her dower one-third of the whole, and obtains a verdict; upon filing the record of judgment commissioners are to be appointed to make admeasurement of dower out of the lands which the jury shall have found in the possession of the defendant, and out of which the plaintiff is entitled to dower. *ib*
6. A plea, in an action of ejectment for dower, alleging that the husband of the plaintiff died intestate; that the defendant occupied the premises under a lease from him, and that the plaintiff and the heirs had collected and received the rents reserved, ever since the death of the husband, as the same became due, and had divided and enjoyed the rents, in proportion to the interest of each in the premises; the plaintiff receiving one-third in lieu of dower; and insisting that the plaintiff was thereby estopped from maintaining the action, does not constitute a defense. *ib*

EQUITY.

See USURY, 7.

EMINENT DOMAIN.

1. The taking of private property for public use can only be justified by virtue of the sovereign right of eminent domain. *The People v. White*, 26
2. Before the organization of our government, this right was exercised throughout the civilized world, and its exercise restricted to cases of public necessity and just compensation. *ib*
3. The provisions on this subject in the constitutions of the United States and of the state of New-York, are only declaratory of a previously existing universal principle of law. *ib*
4. Where land belonging to a citizen was taken under the act of 1819, for the construction of the Erie canal, and used as the bed of the canal for a number of years, and was afterwards abandoned by the state, and the canal located in a different place: *Held* that such land, when no longer necessary for public use, reverted to the original owner, although the act under which it was taken declared it should vest in the state, in fee simple. *ib*

ESCROW.

See DEED, 8.

ESTOPPEL.

An estoppel exists only when there is an obligation, express or implied, that the occupant will at some time, or in some event, surrender the possession; as between landlord and tenant or as between vendor and vendee before conveyance. There is no estoppel as between grantor and grantee. *Bigelow v. Finch*, 498

See CANALS, 1.

EJECTMENT, 2, 6.

EVIDENCE.

1. The amount for which a note is made payable can not be varied by

parol, except by showing want of consideration, fraud or mistake. *Carter v. Hamilton*, 147

2. A party may, by oral or extrinsic evidence, prove a fact which in law would be a sufficient answer to a part or the whole of the plaintiff's claim, provided that fact was not known to the parties or one of them, and was not a subject of negotiation between them, either before or contemporaneously with, the making of the contract. But he can not, in order to vary, contradict, or explain such a contract, introduce oral and extrinsic evidence of any agreement by the parties, by parol, made either at the same time or before, affecting that contract. *ib*
3. Accordingly, where the defendant purchased at auction a quantity of wheat, growing, at \$9.75 per acre, represented to be 105 acres; and gave his note for the amount; *Held* that in an action upon the note the defendant could not be allowed to prove by parol that the agreement at the sale was that the land should be afterwards measured, and the price vary as the number of acres should vary from 105; and that on subsequent measurement it was found to contain but a fraction over 94 acres. *ib*
4. After a sale of lands upon execution, by a sheriff, and the execution of a conveyance to the purchaser, extrinsic evidence can not be resorted to in order to establish the intent of the sheriff in making the sale. It is not like the case of a deed *inter partes*; and the rules applicable to such cases do not apply. *Mason v. White*, 178
5. The testimony of a witness on the trial, that some years previous he had received a letter from the plaintiff in the action; that he had searched for it among his file of letters and other papers, and in every other place where he could think it might be, and could not find it; that he did not think he had seen it since he received it, and that he believed it to be lost; is sufficient proof of loss to admit parol evidence of the contents of such letter. *McKim v. Anderson*, 215

6. Parol evidence can not be given to explain an agreement, so as by it to show, what the parties *agreed to do*.
Stroud v. Frith, 800
7. But, when terms of art are used, and have acquired a definite meaning, known to those engaged in a particular business, but which are not plain on the face of the agreement, evidence may be received as to what that meaning is. *ib*
8. Thus, parol evidence may be received to show what is the business of a "cabinet and mahogany door-maker," and that it includes only the making of doors of mahogany and ornamental woods. *ib*
9. A memorandum, found on the fly-leaf of the book of records of a town, which speaks of the wife of H. as his *widow*, and refers to an examination in respect to trust property of the town, which had been in the hands of H. as a trustee, made by his co-trustees, which memorandum forms no part of the record properly made by any person whose duty it was to make entries in the book; and with nothing to show by whom, or under what circumstances, it was made, is no evidence of the death of H. *Ridgely v. Johnson*, 627
10. A memorandum, indorsed by the surveyor, upon the field book of a survey, is not admissible evidence to prove the death of a person; it being nothing more than the written declaration of a third person, in respect to a matter with which he had nothing to do. *ib*
11. In every instance in which an entry or memorandum made by a third person has been received in evidence against others, it has been where the entry or memorandum related to some act performed by the party making it, in the discharge of his duty, and in the usual course of his business. *ib*
- See DEED, 2, 9, 11.
LEASE.
PRACTICE, 2, 5, 6, 7, 10, 15, 17.
PUBLIC OFFICERS, 4.
- afterwards annul that return, by a supplementary indorsement on the execution that the defendant has sued and recovered for the property.
Hicks v. Ross, 481
2. Where there is a possession at will, or by sufferance, or where possession has been taken under and by virtue of a contract of purchase, it is not such an interest as may be sold upon execution, and either of those facts may be set up as a defense by the defendant in the judgment, when sued in ejectment by the purchaser at the sheriff's sale.
Bigelow v. Finch, 498
3. The same defense may also be made by a grantee of the defendant in the judgment, when ejectment is brought against him. *ib*
- See ARREST, 2.
ATTACHMENT, 1, 2.

EXECUTORS AND ADMINISTRATORS.

1. If lands are sold by an executor, under a power for that purpose contained in a will, to pay debts, a devisee who has an interest in the residue has a right to an account from the executor, of what the debts of the testator were, and of what amount of personal estate has been received by the executor to pay those debts; that he may know whether such sales are valid; and if valid, whether he is entitled to any, and if so, how much of the money raised thereby. *Carroll v. Carroll*, 293
2. Where an executor, with power to sell under the will, or whose duty it is to exert that power with the aid of a surrogate's order, upon becoming aware of the insufficiency of the personal assets, purchases the trust property, at a sale under a mortgage or other incumbrance, for less than its value, he must take it for the benefit of those for whom he is bound to act; provided they assert their rights within a reasonable time. *Conger v. Ring*, 866
3. And where the personal estate of the testator is insufficient to pay his

EXECUTION.

1. A constable who has returned an execution satisfied by sale, can not

debts, and there is no other real estate, the mortgaged premises thus purchased by the executor will, upon the application of creditors of the testator, be *resold*. *ib*

4. The sole purpose of directions in a decree for the sale of mortgaged premises, authorizing any party to the suit to become a purchaser, is to avoid the effect of a supposed technical rule that a party to a suit can not become a purchaser under the decree, without special leave; not to authorize him to purchase and hold contrary to equity. *ib*

5. An action may be maintained by executors against their co-executor, to compel him to pay a debt he owes the estate, and which is necessary to pay a sum decreed by the surrogate to be due from the estate to the plaintiffs, for moneys paid by them on account of the estate. *Wurts v. Jenkins*, 548

6. The surrogate's decree, upon a final accounting of the executors, is no bar to such an action, where it appears that the defendant had never rendered an account of the debt due from him to the estate, and the same was not embraced in the proceedings upon the final accounting. *ib*

See LIMITATIONS, STATUTE OF, 6, 7, 8.
PLEADING, 2.

F

FENCE-VIEWERS.

1. H. and W. were the owners of adjoining land. H. let his land lie open, and W. built the whole of the division fence between them. Afterwards H. enclosed his land. A dispute having arisen between the parties as to the value of said division fence and the proportion thereof which W. ought to pay to H., it was *held*, that the fence-viewers of the town, under 1 R. S. 353, §§ 80 to 36, had jurisdiction of the matter. *Hewitt v. Watkins*, 409
2. The decision of the fence-viewers, in such a case, should be reduced to writing and filed in the office of the town clerk; and when the dispute is as to the value of the fence, and the proportion thereof which one party should pay to the other, it should specify such sum, and an action will lie to recover the same. *ib*
3. If the dispute relate only to the value and sum to be paid, and there be no dispute about the proportion of the fence to be maintained by each, the certificate is valid, although it is silent about the proportion to be maintained by each. It is enough that it disposes of the matter submitted to the fence-viewers. *ib*

FIXTURES.

See REAL ESTATE.

FORECLOSURE SUIT.

1. G. L., in 1826, gave a mortgage upon his real estate, in which his wife did not join. He had previously contracted to sell to the defendant, and other persons, various parcels of said land, and the contracts were included in the mortgage, and assigned to the mortgagee, with the moneys due and to grow due thereon. G. L. died in 1830, leaving a will, in which he made a provision for his wife, the plaintiff, not expressed to be in lieu of dower, and appointed her executrix, and several other persons executors. After the testator's death, the assignee of the mortgage, and several of the persons holding contracts of purchase, one of whom was the defendant in this suit, united and filed a bill in chancery against the widow and the devisees under the will, one of whom was the executor that had qualified, and served on the defendants in that suit a notice stating that the object of the suit was to foreclose the mortgage, and that they made no personal claim against the defendants, and in the bill filed by them they set forth the rights of the defendants under the will, and that the widow and one of the defendants had qualified as executrix and executor—and then set forth generally that said defendants had, or claimed to have, some interest in the premises, as subsequent purchasers, incumbrancers, or otherwise;

but made no mention of the widow's claiming dower, or any allegation in reference thereto, and the defendants suffered the bill to be taken as confessed, and a decree of sale was made in said suit, and that the purchaser be let into possession; and upon a sale being made under said decree, the assignee of the mortgage became the purchaser, and received a master's deed. In an action of ejectment by the widow, to recover dower in the mortgaged premises; *Held* that the title acquired by the purchaser was subject to the widow's claim for dower; that her claim for dower was paramount to the mortgage, and that the decree and master's deed was no bar to such claim for dower; that the bill was not properly framed to enable the complainants to litigate her claim to dower in that suit; that as there was no allegation in the bill relative to her claiming dower, or that the devise under the will was in lieu of her dower, she was not a party to that suit as doweress, but only as executrix and devisee, and that her claim to dower, being paramount to the mortgage, was not the subject of litigation in that suit; and that, as to that claim, she would not have been a proper party to the suit. *Lewis v. Smith*, 152

2. The bar against all parties defendants, mentioned in the statute (2 R. S. 192, § 158) refers only to the proper parties to a foreclosure suit, viz. mortgagors and mortgagees, and subsequent incumbrancers, and to such rights as have been properly the subject of litigation in the foreclosure suit. It does not embrace paramount rights of parties which have not been subjected to litigation, by the form or substance of the pleadings in the case. *ib*

See EXECUTORS AND ADMINISTRATORS, 2, 3.

FORFEITURE.

See LANDLORD AND TENANT, 2.

FRAUDS, STATUTE OF.

See AGREEMENT, 3.

G

GUARANTY.

1. Where a person, by an instrument in writing under seal, expressing a consideration of one dollar to him in hand paid, guaranties the payment of a debt owing by another, the consideration thus expressed is sufficient to satisfy the requirements of the statute of frauds, and to support an action upon the guaranty; notwithstanding the defendants prove on the trial, that the one dollar was not in fact paid. *Childs v. Barnum*, 14
2. The seal imports a consideration, and calls on the defendant to rebut that presumption. The burthen of proof, therefore, falls on him, and to sustain his defense, he must prove, not only, that no consideration was paid, but that none was agreed to be paid. The omission to pay the one dollar does not show a want of consideration, and proof that it was not paid will not entitle the defendant to a verdict. *ib*
3. Where, in consideration of \$204, paid by the plaintiffs to the defendant, the latter assigned a bond and mortgage to the former, and covenanted that \$204 and interest was due thereon, and by an indorsement on the bond executed at the same time, guarantied the payment of the bond when due; *Held* that the assignment and the guaranty were to be regarded as one instrument, and that the plaintiffs could recover upon the guaranty, although it was not under seal, and no consideration was expressed in it. *Hanford v. Rogers*, 18
4. A guaranty of the payment of the note of another, made coterminously with the note and for a good and valuable consideration in fact, is not valid and binding, within the statute of frauds, unless a consideration is expressed in it. *Welles, J. dissented. Brewster v. Silence*, 144
5. A guaranty, indorsed upon a promissory note, immediately after the making thereof, and before its delivery, is no part of the note, but is a separate and distinct undertaking, although made for the same object as the note. *ib*

6. Where the payee of a note indorsed the same to the defendant, and the latter transferred it to the plaintiff, for a valuable consideration advanced by him at the time, the defendant executing upon a separate paper a guaranty of the payment of the note, but the *guaranty expressed no consideration*; *Held*, that the guaranty, being supported by a consideration *in fact*, independent of the note, was valid; but that if not collectable as a contract of guaranty, the plaintiff was entitled to recover on a count for money lent and advanced, upon the implied assumption. *Tyler v. Stevens*, 485

7. In an action upon such a guaranty the defendant may show that the note has been paid. But evidence that money or property has been delivered by the indorser to the plaintiff, without showing an understanding that it should be applied upon the note, will not authorize a legal presumption of the satisfaction of the note by the indorser. *ib*

GUARDIAN AND WARD.

Where a guardian advances money out of his own pocket, for the erection of buildings upon the land of his ward, without the order of a court of equity, he can not recover the amount from his ward. *Hassard v. Rowe*, 22

H

HEIRS.

1. Heirs may be made liable for the debt of their ancestor, but not unless it appears that the personal assets were not sufficient to pay the same, or that after due proceedings before the surrogate and at law, the creditor has been unable to collect such debt from the executor, or from the next of kin, or legatees. Thus a suit at law, against the prior parties, is an essential preliminary to a right to sue the heirs. The heirs are to be sued jointly in equity. *Stuart v. Kissam*, 271

2. It makes no difference, that the same persons are entitled to the

whole estate real and personal. The statute makes no exception; but requires the creditor in *all cases* to seek satisfaction from the personal property, before he resorts to the real estate in the hands of the heir. *ib*

3. In a suit of this kind, whether at law, or in equity, all the heirs must be joined; and the heirs and personal representatives *can not be joined* in a suit. *ib*

HIGHWAYS.

1. If a highway is laid out in the mode pointed out by statute, that may be done at once. But if user is relied upon to prove a dedication to the public, the authorities differ as to the time requisite. Yet there is no doubt user is sufficient. *Per HAND, J. Wiggins v. Tallmadge*, 457

2. A dedication to the public must be with intent to dedicate. But when that intention is ascertained, whether by the express declarations and acts of a party, or by user, it is sufficient. *ib*

3. Forty years before suit, the grantor of the defendant, and his neighbor, opened a lane or road upon their boundary lines, to accommodate the adjoining lands, taking ten feet from each side. The road thus opened was used uninterruptedly by the public, thenceforth, until shut up by the defendant, the year before the trial. In 1848 the commissioners of highways ascertained, described and entered such road upon record. In 1826 they surveyed, laid out and recorded, and made to connect with the road or lane in question, the road beyond, on which inhabitants resided who had no other egress. *Held* that there was sufficient evidence of a *dedication* to the public, upon which the public and individuals had relied; and of an adoption of such road by the proper authorities. And the defendant having purchased a farm adjoining the road, many years after the dedication, and having acquiesced in the use of the road by the public for 22 years and then obstructed the

same, by building a fence through the center thereof; *Held further*, that he was liable for such obstruction, in an action at the suit of the commissioners of highways. *CADY, J.* dissented. *ib*

HUSBAND AND WIFE.

1. Although a woman be married, and have a separate estate, and a trustee, yet when the trustee puts before her eyes, clear and express notice of his doings, the same inferences must be drawn as to her reading and understanding the notice, as would arise in the case of an unmarried woman, or a man. *Stuart v. Kissam*, 271
2. A husband, after the death of his wife, may maintain an action to recover for use and occupation of the wife's real estate, by the permission of the plaintiff and his wife, during coverture. *Jones v. Patterson*, 572

See MORTGAGE, 2.

I

INN KEEPER.

See LIEN.

INJUNCTION.

See WASTE.

INSURANCE.

1. By a resolution of the board of trustees of an insurance company, their president was authorized to raise funds for the payment of the debts of the company, on the pledge of its assets. At that time the company held a promissory note for \$3000, not yet due, and for which the makers, after the passage of the resolution, and at the request of the president, substituted *two other notes*, in the aggregate of equal amount. Subsequently, the president borrowed money on the note of the insurance company, pledging *one of these notes*, together with other

assets of the company, as collateral security. The company failed, leaving the money so borrowed unpaid, and the lender brought a suit on the note so pledged. *Held*, that he was entitled to recover against the makers of that note, although it appeared on the trial that the balance of the account between themselves and the company, was in their favor, to an amount larger than the amount of the note in suit. *Held*, also, that if a resolution was required to render the pledge in this case valid, the substituted notes would seem to be as much within the resolution, as the original note, in whose place they were put. *Crooke v. Mali*, 206

2. Whether the general agency, belonging to the situation of president of such a company, would not extend to authorize the borrowing of money on a pledge of its securities, for the payment of its ordinary business debts? *Quære.* *ib*
3. A contract entered into between a party insured and another, by which the former agrees to sell and convey to the latter the property insured, at a future day, on the purchaser's paying a part of the purchase money and securing the balance by a bond and mortgage upon the property, is not—in the absence of any evidence showing that the purchaser has complied with the conditions of the agreement, on his part—an *alienation* of the property insured, within the meaning of a section of the charter of the insurance company, declaring that when any property insured with the company shall be *aliened by sale or otherwise*, the policy shall be void. *Masters v. The Madison County Mutual Insurance Company*, 624
4. The term *alienate* has a technical legal meaning; and any transfer of real estate, short of a conveyance of the title, is not an alienation of the estate. *ib*
5. The surveyor and agent of an insurance company, on being applied to, for an insurance upon the plaintiff's mill, went to see the property, and made a survey thereof, the plaintiff not accompanying him, but leaving him to transact the business, and do whatever was neces-

sary. The agent then made out the application, for the plaintiff to sign; using the printed blank furnished to agents for that purpose. He was informed at the time, by the plaintiff's son, that there was a mortgage on the premises, which was a lien thereon. But the application made no mention of any incumbrance: *Held*, that the notice given to the agent, of the prior incumbrance, was sufficient notice to the company; and that the omission to set forth the mortgage in the application, was not a breach of warranty, or a concealment of important matters affecting the risk; notwithstanding the application, by a memorandum in the margin, required the applicant to state whether the property was incumbered, by what, and to what amount, and if not, to say so; and although the by-laws of the company made the person taking the survey the agent of the applicant. *ib*

6. *Held also*, that under these circumstances, the plaintiff could not be prevented from recovering against the company, upon the policy, by the omission to mention, in the application, the fact that there were other buildings standing within ten rods of the property insured, in answer to an interrogatory upon the margin of the application. *ib*
7. The fact that an applicant for an insurance merely states the nearest buildings—without professing to do more, or to make any further statement—does not amount to a warranty that there are no other buildings within the given distance of ten rods. *ib*
8. If there are other buildings, it amounts to the withholding of information called for by the interrogatory; and then the question arises whether it is material to the risk. If the risk is not increased by the other buildings, then the withholding of the information is immaterial. This is a question of fact, proper to be submitted to the jury. *ib*
9. Although the by-laws of an insurance company make the person taking a survey in its behalf, the agent of the applicant, still he is the agent of the company also, and it is bound by his acts. *ib*

J

JUDGE'S CHARGE.

See PRACTICE, 1, 8, 11, 12, 13, 14.

JUDGMENT.

1. The recovery of a joint judgment against principal and surety does not merge the suretiship of the surety, and render him a principal debtor. *La Farge v. Herter*, 159
2. Where a creditor accepts from a debtor his bond, secured by a mortgage upon real estate, for the amount of a judgment and other demands, against the mortgagor, which bond and mortgage are intended and received as a payment of the judgment, the judgment will be deemed satisfied and extinguished, and no recovery can be had thereon. *ib*
3. The lien of a judgment does not in equity attach upon the mere legal title to lands, existing in the defendant, where the equitable title is in another person. *Lounsbury v. Purdy*, 490
4. And if a purchaser, under the judgment, has notice of the equitable title, prior to the purchase and the actual payment of the purchase money, he can not protect himself as a bona fide purchaser. *ib*
5. In an action of debt upon a judgment rendered against the village of Lockport, by the president of the village, upon confirming an assessment for laying out a street under the 46th section of its charter, the defendants can not set up as a defense that the proceedings for laying out the street were irregular; or that the street laid out ran across or over the site of a building or buildings, the expense of removing which would exceed \$100. *Buell v. Trustees of Lockport*, 602
6. Such a judgment is final and conclusive against the trustees; and they can not impeach it, except for want of jurisdiction, appearing on the record, or by some matter dehors, which can be shown without contradicting it. *ib*

7. After a jury has assessed the damages for removing a building, and for the land, at less than \$100, and judgment has been rendered upon their verdict, the trustees in an action upon the judgment, can not show by parol, or by the opinions of witnesses, that the expense of removing the building would exceed \$100. *ib*
8. When an assessment for opening a street has been made, and confirmed by the trustees of Lockport, and judgment has been rendered against the trustees, for the amount, by the president of the board, the neglect of the trustees to open the street will not destroy the right of action upon the judgment by the owner of the property taken. *ib*

See REPLEVIN.

JUDICIAL NOTICE.

The court can not take judicial notice of what are the fair and usual commissions on acceptances paid without funds. *Seymour v. Marvin*, 80

JURISDICTION.

1. Although in pleading a bankrupt's discharge by a district court of the United States, the facts on which jurisdiction depends must be averred, yet when the discharge is offered in evidence, jurisdiction will be presumed, until the contrary appears. *Morse v. Cloyes*, 100
2. The circuit and district courts of the United States are courts of limited but not of inferior jurisdiction. If jurisdiction be not alledged in the proceedings, their judgments and decrees may be reversed for that cause, on a writ of error, or appeal; but until reversed they are not nullities, and can not be disregarded. *ib*
3. The rule by which jurisdiction in fact is presumed, from its exercise, does not attach by reason of the situation or character of the parties to the litigation, but by reason of the character of the court by which the decree was granted. And it is that

character that gives efficacy to the decree, without proof of the preliminary proceedings to show the jurisdiction. Hence, whenever the decree is rightfully given in evidence due effect must be given to it, until it is shown that the court had not jurisdiction in the premises. *ib*

4. The supreme court has the same jurisdiction which the court of chancery formerly possessed, to restrain waste, upon a bill filed, stating the facts. *Rodgers v. Rodgers*, 596

See JUSTICE'S COURT, 1, 2.
PLANK ROADS, 6.
WASTE, 3.

JUSTICE'S COURT.

1. Neither a justice's court, nor the marine court of the city of New-York, acquires jurisdiction of the cause, where the defendant, being a non-resident, is sued by a summons, returnable more than four days after its date, or served more than two days before the return day; and even if the defendant, when brought before the court by such illegal process, should ask for and obtain an adjournment, and, under force of that process, plead to the action, it will not authorize the entry of a judgment against him. *Robinson v. West*, 309
2. *It seems*, that where the statute declares expressly, that a justice shall have no jurisdiction of the cause, if the defendant be not proceeded against as the law prescribes, this strips the justice of all official authority, and he possesses no more power to accept a waiver, and thus acquire jurisdiction, than a private individual would have. *ib*
3. On the trial of a cause in a justice's court, and after the parties had rested, and while the counsel were summing up, a witness was permitted to be recalled, notwithstanding the defendant's objection, to state how he swore, in relation to a particular fact to which he had been examined. *Held* not to be error. *Dunkle v. Kocker*, 387
4. Where the complaint, in a justice's court, is so drawn that the defend-

- ant can set up title in his answer, and on giving the requisite security onat the justice of his jurisdiction; but he omits to set up title, the justice retains his jurisdiction, and the defendant will be precluded from drawing it in question, on the trial. *Adams v. Rivers*, 890
5. Where a defendant in a justice's court, on the decision of a demurrer against him, puts in an answer, he thereby waives the demurrer; and the supreme court, on appeal, can not review the decision of the justice in overruling the demurrer. *Ervine v. Forbes*, 587
6. A railroad company may properly be sued in a justice's court, by long summons. *Johnson v. The Cayuga and Susquehanna Railroad Co.*, 621
7. In cases of corporations, no provision is made by statute for process by warrant, or attachment, or short summons. *ib*
8. An omission in a summons issued by a justice of the peace, to state the *plea* in which the defendant is to answer the plaintiff, or the *nature of the claim* alledged by the plaintiff, is no cause for reversing a judgment rendered by the justice. *Cornell v. Bennett*, 657
9. Nor is it a sufficient cause for the reversal of a judgment, rendered by a justice of the peace on the return of a summons, that the justice did not appear at the place named in the summons for the trial, until half past three o'clock, when the summons was returnable at one o'clock P. M., if the defendant was present at the trial, although he did not appear in the suit. *ib*

See ATTACHMENT, 3, 4, 5, 6.

L

LANDLORD AND TENANT.

1. Payments made by a tenant to his landlord on account of rent, generally, will, in the absence of any direction by the tenant and any agreement of the parties, be applied by the law on the rent due at the

time, and not on the rent then accruing. *Hunter v. Osterhoudt*, 83

2. It is only where rent is paid which accrued after a forfeiture, that the acceptance of such payment is considered an affirmance of the lease, and a waiver of the forfeiture. The acceptance of rent which accrued prior to the right of entry is not a waiver of the forfeiture. *ib*

LEASE.

Where a person takes an assignment of a lease he enters into the place of the lessee and takes the premises subject to the accruing rent. This is the legal effect of the written contract; and any proof to show that the lessee agreed to pay the rent which should thereafter become due, would contradict the written contract. Therefore parol evidence for that purpose is inadmissible. *Graves v. Porter* 592

LEGACY AND LEGATEE.

1. Actions may be brought against legatees by a creditor; but he must show that no assets were delivered by the executor to the next of kin, or that the value of such assets has been recovered by some other creditor; or that they are not sufficient to satisfy his demand. *Stuart v. Kissam*, 271
2. An action may be brought by one or more of several legatees, in behalf of themselves and the others, against the personal representative of the testator, and the residuary legatees and devisees, for an account of the personal estate and of the debts, legacies, &c. and to have the real estate sold and the proceeds, together with the personal estate, applied in payment of the debts and legacies. And all the legatees may avail themselves of the decree. This rule has not been changed by the code of procedure. *McKenzie v. L'Amoureux*, 516

LIBEL.

A publication alledging that the plaintiff, being an influential politician

in the city of A., had been paid \$5,000 in cash, for procuring the appointment of an inspector of pork in the city of N. Y., by the governor, and that large sums had also been paid to the plaintiff for other lucrative offices, *held* libelous *per se*.
Weed v. Foster, 203

LICENSE.

See TRESPASS, 1, 2.

LIEN.

1. Neither the keeper of a livery stable, nor an agister of cattle, has a lien on a horse delivered to him for keeping, without a special agreement to that effect. *Fox v. McGregor*, 41
2. An innkeeper has no lien upon a horse put into his stable, unless belonging to a guest. *ib*
3. An innkeeper can not, at common law, sell his guest's horse for his keeping. The remedy to enforce the lien is by action in the nature of a bill in chancery. *ib*

See AGREEMENT, 14.
MECHANICS' LIEN LAW.

LIMITATIONS, STATUTE OF.

1. What is a sufficient promise to take a case out of the statute of limitations; and what is sufficient evidence to support such a promise. *Sherman v. Wakeman*, 254
2. Where a note has been barred by the statute of limitations, in order to sustain an action to recover the amount thereof, there must be proof of an unqualified promise to pay the entire debt, in express terms, or by fair and just implication from an explicit admission of it as an existing debt, for which the debtor acknowledges himself liable, and which he is willing, and intends to pay. *ib*
3. If the promise be conditional, to pay when able present ability must be shown. *ib*

4. To support an action upon a note barred by the statute, one of the plaintiff's witnesses testified that the defendant told the plaintiff he would give him two notes, one at six, and the other at twelve months; that he wanted the plaintiff to feel at liberty to call at any time; that he could come in at any time, and expect something on account. The other witness testified that the defendant said this was a debt which he intended paying, and would pay. That he felt in honor bound to pay this debt, and would pay it. That he felt under obligations to pay the plaintiff on account of services which he had rendered him. In addition to this, there was proof that the defendant was able to pay the debt claimed by the plaintiff. *Held*, that the evidence was not of that equivocal, vague and indeterminate character, that ought not to go to the jury as evidence of a new promise; and that a motion for a nonsuit, upon the evidence, was properly denied. *ib*

5. The rule which was laid down in the case of *Bell v. Morrison*, (1 *Peters' Rep. Sup. Ct. U. S.* 851,) and which was adopted in the case of *Purdy v. Austin*, (8 *Wend.* 187,) and which has since been followed in this state, is, that in order to prevent a statutory bar, there must be an admission of a previous subsisting debt, which the party is liable and willing to pay. *ib*

6. An executor, to whom the testator had given full power to sell, dispose of, lease, or mortgage, any or all of his real estate, for the payment of debts and legacies, and for the division of the balance among the devisees named in the will, by his acts held himself out to the devisees as engaged in winding up the estate, and discharging claims that would be prior to theirs; *Held*, that while he was doing, or professing to do this, the statute of limitations could not run against *them*, who had no rights as against *him*, until those prior claims were paid. *Carroll v. Carroll*, 292

7. *Held also*, that every new act of his, in raising money as executor, out of the estate, to pay the debts of the testator, was as effectual an acknowledgment of his continuous acting as

executor, and his continued and unbroken liability as executor, as if, in each case, he had promised each devisee or legatee, that he would account as executor. *ib*

8. *Held further*, that executing mortgages in the character of executor, upon a part of the estate, reciting the power for that purpose given him in the will, and alledging that it was "for the purpose of raising funds, to pay off and discharge existing debts and liabilities upon and against the estate of the testator," were acts of this description. *ib*

9. A demurrer must, generally, depend on that which appears in the complaint, (or pleading demurred to,) and not on that *quod non constat*, unless this last is an essential to a *prima facie* cause of action. *ib*

10. A decree made by a surrogate, establishing the indebtedness of an intestate's estate, upon a promissory note given by the decedent, and ordering a *pro rata* payment thereon, out of the assets, does not amount in law to a promise, on the part of the administratrix, to pay the balance; so as to deprive her of the benefit of the statute of limitations. *Arnold v. Downing*, 554

11. In order to take a demand out of the statute of limitations, by a part payment, it must appear that the payment was made on account of the debt for which the action was brought. And it must further appear that the payment was made as *part payment of a larger debt*. *ib*

12. To make a part payment evidence of a promise to pay the balance, it must be voluntary, on the part of the debtor; and it must occur under such circumstances as are consistent with an intent to pay such balance. *ib*

LIQUIDATED DAMAGES.

Parties may, by their mutual agreement, settle the amount of damages, uncertain in their nature, in respect to the performance or omission of a particular specified act, at any sum upon which they shall agree. *Mott v. Mott*, 127

See AGREEMENT, 7, 9.

M

MECHANICS' LIEN LAW.

1. The word "*owner*," as used in the mechanics'-lien-law, is the correlative of *contractor*, and means the person who employs the contractor, and for whom the work is done, under the contract. *McDermott v. Palmer*, 9

2. On the 22d of October, 1844, W. entered into a contract with P. to do the mason work upon thirteen houses to be erected by P. in the city of New-York. On the 21st of December, 1844, an agreement was made between W. and McC. as parties of the first part, and P. as the party of the second part, in which the agreement between P. and W. and also another agreement between P. and McC. as to the carpenter's work to be done on the said buildings were mentioned by way of recital, and by which it was mutually agreed and declared that the said agreements were thereby made void, and each of the parties released therefrom, &c. The parties of the first part then covenanted that they would purchase the said thirteen houses, &c. and that they would assume the payment of a sum of money then due and payable on a contract for the conveyance of five of the houses and lots, and also of a further sum due on the remaining eight lots, and would also pay to P. the several sums of money which had been advanced to the parties of the first part upon their respective agreements, and also a further sum of money being the balance of the purchase money of the said houses and lots; all of which said sums agreed to be paid to P. were to be secured by a mortgage upon the premises, to be executed to P. whenever a deed should be given. The agreement then contained a covenant that the parties of the first part would complete and finish the said thirteen houses according to the terms of the agreements first mentioned, and P. covenanted and agreed to give his notes for the amounts therein mentioned, and by a memorandum attached to the contract, agreed that a deed should be given when the several obligations of the parties should be ful-

filled. *Held* that such agreement created the relation of owner and contractor, between P. and W. and McC. within the meaning of the act of April 20, 1830, for the better security of mechanics and others erecting buildings in the city of New-York. *ib*

MEMORANDUM.

See EVIDENCE, 9, 10, 11.

MORTGAGE.

1. Under the revised statutes, as amended in 1844, there are three necessary prerequisites to a valid sale under a power contained in a mortgage. The notice of sale must be published for a specified time in a specified newspaper; a copy of such notice must be affixed in a specified place, a certain period before the time of sale; and a copy must be served upon the mortgagor or his personal representatives, &c. at least fourteen days before the time of sale. *King v. Duntz*, 191
2. Where a mortgage is executed by husband and wife, and the wife survives her husband, she is entitled to notice of sale. And if notice is not served upon her, she is not barred by the sale; and the heirs at law of the husband may take the objection. *ib*
3. In case of the death of the mortgagor, notice of sale need not be served upon the heirs. *ib*
4. On the 4th of December, 1846, the plaintiff executed two mortgages on the same premises, for the purchase money; one to S. for \$221,56, payable in nine equal annual installments; and the other for \$86,23, payable to the defendant in three equal annual installments, the first to become due December 4, 1856. It was agreed the mortgage to S. should be the first lien on the premises. This mortgage was subsequently assigned by S. to the defendant, and was foreclosed under the statute. Upon the sale of the premises, on the 5th of January, 1850, the same were struck off to

M. for \$481,50, a sum larger than the amount due upon the mortgage, with the costs of foreclosure. *Held* that the defendant was entitled to have the mortgage for \$86,23, first satisfied out of the surplus moneys; and that the plaintiff was entitled only to the balance remaining, after paying that mortgage with interest. *Barber v. Cary*, 549

See FORECLOSURE SUIT.
TRUSTS AND TRUSTEES, 3.
WASTE, 1, 2.

N

NAVIGABLE WATERS.

It is a general rule that no person can acquire an exclusive right in navigable waters, except by grant from the sovereign power, or by prescription, which supposes a grant, the evidence of which has been lost. *Brinckerhoff v. Starkins*, 248

See OYSTERS.

NEGLIGENCE.

See RAILROADS, 1, 2, 3, 4, 5.

NEW TRIAL.

See PRACTICE, 10.

NOTICE OF PROTEST.

See PROMISSORY NOTES, 8, 9.

O

OPINIONS OF WITNESSES.

See JUDGMENT, 7.

OYSTERS.

1. A person who plants oysters in navigable waters, opposite to the land of another person, does not thereby acquire such a possession of them

- as will enable him to maintain trespass against the owner of the adjacent land for taking them away. *Brinckerhoff v. Starkins*, 248
2. It is not doubted that oysters are animals *fera natura*; nor that the sea, or navigable bays and rivers, are their natural element. *ib*
 3. The only right which a person can acquire to animals *fera natura*, is a qualified property in them; that is, they are his property while they continue in his keeping, or actual possession. But if they escape, or if he permits them to go at large, his property instantly ceases, unless they have *animus revertendi*, which, it is said, is only to be known by their custom of returning. If the intention to return exists, in contemplation of law, the possession continues. But in the case of oysters no power of locomotion exists; they can not, of their own act, either escape or return. It follows then, that a man can have property in them, only when he has an actual possession. *ib*
 4. It can not be contended that a party who has once acquired the possession and ownership of oysters, can restore them to their natural condition in navigable waters, and without asserting any other right of ownership, or establishing any other evidence of actual possession, can recover in trespass, against any person who shall, at any future time, carry them away. He should, at least, have the power of present actual possession, accompanied by a continued assertion of ownership, and by such evidence of the right of possession as will necessarily exclude the right of any other person. *ib*
 2. His assumed relation of father entitles him, on the one hand, to their services without compensation; and entitles them, on the other, to their support and education, without remuneration. *ib*
 3. In such cases, the step-father and step-children will be deemed to have dealt with each other in the character of parent and child, and not as strangers; without obligation, on the part of the father, to pay for his children's services, or on the part of the children to remunerate their father for their support. *ib*
 4. The case of *Gay v. Ballou*, (4 Wend. 403,) so far as it holds that a stepson is liable either upon an implied promise, or upon an express promise during his minority, to pay for necessities furnished by his step-father, must be considered as overruled. *ib*

PAROL EVIDENCE.

See EVIDENCE, 1, 2, 3, 6, 8.
JUDGMENT, 7.

PARTIES.

See WITNESS, 8.

PARTNERSHIP.

1. By written articles of agreement, three persons entered into a special partnership, to continue for a certain limited period; one was a special partner, the others were general partners, and the business was to be conducted in the joint names of the general partners. In a short time afterwards, and before the limited period, a second agreement was entered into between them, by which it was agreed that one of the general partners should sell out to the special partner, and should withdraw from all active participation in the business, and that the special should become a general partner; but that the partnership should not be dissolved until certain notes, given by the firm, should be paid; and that in the mean time the partner who sold out should allow his

P

PARENT AND CHILD.

1. Although a step-father is not bound, in law, to support his step-children, yet if he acts the part of a father towards them, and does support them, the law will not imply on their part, a promise to pay him for such support. *Sharp v. Cropsey*, 224

name to be used as one of the firm, for business purposes, purchasing goods, &c. and giving notes therefor, and the business was continued without any change in the name of the firm. Goods were purchased, and notes therefor given by the two remaining partners, in the original name of the firm, before the expiration of the time limited for the continuance of the original partnership, and before the payment of all the notes mentioned in the second agreement: *Held*, that the second agreement made all three of the parties partners as to third persons until the notes alluded to therein should be paid; and that all three of the parties were liable on the notes thus given for goods purchased for the new firm. *Buckley v. Dingman*, 289

2. Where a promissory note belonging to a partnership, is transferred or paid over by an individual member thereof, in satisfaction of his own private debt, it is incumbent on the plaintiffs, in a suit brought upon such note, to show the assent of the other partner, in order to bind him. *Kemey v. Richards*, 312
3. And such knowledge and assent must be clearly shown, and not left to be inferred from vague and slight circumstances. *ib*
4. The question of assent is a question of fact, peculiarly within the province of a referee, with which the court ought not to interfere, if it be merely doubtful whether he was correct in his conclusion on that matter, or not. *ib*
5. The report of a referee may be sustained, although he improperly admits some testimony, if, on rejecting that, enough remains to sustain his report. *ib*

See REAL ESTATE, 3.
TELEGRAPH COMPANIES.

PLANK ROADS.

1. In what cases the location of a toll-gate, erected upon a plank road, will be changed, upon application to the county court, by the commissioners of highways, on the ground of such

location being unjust to the public interest, by reason of the proximity of diverging roads. *McAllister v. The Albion Plank Road Co.* 610

2. To locate toll-gates, upon a plank road, in such a manner as to compel persons who have traveled several miles on diverging roads to pay half toll for the privilege of traveling 252 rods upon the plank road, is unjust to the public interests. *ib*
3. So where a company has, in legal effect, constructed a plank road the distance of 252 rods, and exacts the legal toll for a distance of 400 rods. *ib*
4. There is no propriety or justice in allowing a company to make a plank or turnpike road on a main thoroughfare leading to a large village, for the distance of seven-eighths of a mile, and to collect tolls for that distance of all persons traveling on such thoroughfare; where the place selected for such road is that part of the thoroughfare most contiguous to the village, with which a large number of roads have united and added their travel to the piece of road over which the plank or turnpike road has been constructed. *ib*
5. The application to the county court, to change the location of a toll-gate, must be made by all of the commissioners of highways of the town. But if made by two only, the objection that the third has not joined, must be made before the county court; otherwise the irregularity will be deemed waived, and the objection can not be raised on appeal. *ib*
6. A county court has jurisdiction to entertain an application of that nature, and to make an order changing the location of a toll gate; notwithstanding the 29th section of the code of 1849. *ib*
7. Where, upon an appeal to the supreme court from the decision of the county court in changing the location of a toll-gate, referees are appointed to hear, try and determine such appeal; who make their report to the supreme court, of the evidence and of their decision thereon, the judgment to be given by the

court is a judgment of reversal or affirmance of the order made by the county court, and not of the report of the referees. *ib*

8. The court is not to be controlled by the decision of the county court, or the report of the referees, but may give such judgment as justice and equity shall require. *ib*

PENALTY.

See AGREEMENT, 7, 9.

PLEADING.

1. The defendants, creditors of a bankrupt, believing that he possessed, and retained in his possession, or under his control, certain property not disclosed nor surrendered to the plaintiff, who was the official or general assignee in bankruptcy, and that proceedings in law or in equity might be necessary to enforce a delivery of such property, executed a bond to the plaintiff, conditioned to pay, or cause to be paid, all costs, fees and expenses which he should or might incur or sustain by reason of any such proceedings to be commenced by him, and to indemnify and save him harmless therefrom. In an action upon this bond the defendants pleaded *non est factum*, and also a special plea alledging that the plaintiff recovered and accepted from the bankrupt, and others on his behalf, money and choses in action of the value of \$10,000, the property of the bankrupt, and the costs and expenses of the plaintiff's proceedings at law and in equity, and more than sufficient to pay all the legal expenses which he had incurred or paid, &c. To this plea the plaintiff replied that he did not at any time recover or accept from the bankrupt or from any other person, the costs of his said legal proceedings, or any money or choses in action as and for such costs. *Held* on demurrer, that the replication was sufficient. *Waddell v. Delaplaine*, 284
2. A fishing bill in the objectionable sense, is one in which the plaintiff shows no cause of action, and en-

deavors to compel the defendant to disclose one in the plaintiff's favor. The expression is not applicable to a bill filed by a devisee or legatee against an executor, for an account; although there is an avowed ignorance of the exact amount of moneys that the executor has realized from the estate; that being a matter peculiarly within the executor's knowledge, and which the plaintiff, for that reason, is entitled to "fish out" of the executor, by a prayer for discovery. *Carroll v. Carroll*, 298

3. It would be a great innovation in pleading, to require the pleadings to show that the plaintiff was entitled to arrest the defendant in an action on contract. It was not the practice to do so under the former law, when a non-resident could be arrested and taken on a *ca. sa.*; nor under the non-imprisonment act of 1831, where the defendant could only be imprisoned in actions on contract, when something like fraud was established. *Barker v. Russell*, 308
4. The complaint is to state the facts constituting the cause of action. If the cause of action be a contract, the facts establishing the contract are all that are to be stated: not the facts which are to determine the extent of the remedy; especially, where the law has directed the latter class of facts to be established by affidavit, to the satisfaction of a judge, and not of the jury. *ib*
5. In a complaint charging a trespass by the defendant's horses on the plaintiff's land, and alledging by way of aggravation, the kicking and breaking the collar bone of the plaintiff's horse, it is not necessary to aver that the defendant's horses were accustomed to kick, or that the defendant had notice of the vicious propensity. *Dunkle v. Kocker*, 387
6. A demurrer to a complaint will not lie, on the ground that the complaint does not aver or show that the debt for which the action was brought had become due at the time of the commencement of the action. *Maynard v. Talcott*, 569

7. Where it does not affirmatively appear that the suit was commenced before the cause of action accrued, the court will not intend that it was, for the purpose of supporting a demurrer to the complaint. *ib*
8. If the court is to presume either way, the presumption should be that the debt sued on was due before the commencement of the action. *ib*
9. In an action by the reversioner, against tenant for life and another, to recover damages for injuries to the inheritance and reversionary interest of the plaintiff, the complaint may state a cause of action for wrongfully cutting, removing, and converting wood, and also a cause of action for drawing off the wood which *had been cut*, and converting it. *Rodgers v. Rodgers*, 595
10. A cause of action for cutting and removing timber, and one for removing fire wood already cut, and converting it, followed by averments of injury to the inheritance and reversionary interest of the plaintiff, may be united, under the code, if they affect all the parties to the action. But if either cause of action is against only one of the defendants, it is not proper to unite it with the cause of action against both. *ib*
11. When the statement of facts constituting a cause or causes of action will support either of two actions, and it is doubtful which the pleader intended, the demand for judgment may be consulted, with a view of ascertaining which action was intended. *ib*

POSTMASTER.

No action will lie in behalf of publishers of a newspaper, against a postmaster, for a breach of duty in refusing to receive the proofs offered by them in regard to the circulation of their paper, and to give them the publishing of the list of letters remaining in the post office, according to the act of congress and the instructions of the postmaster general, whereby they lost the employment, and the gains and profits arising therefrom. *Strong v. Campbell*, 185

POWER OF ATTORNEY.

See PRINCIPAL AND AGENT.

PRACTICE.

1. Where, upon the trial of a cause the only objections made by the defendant rest entirely on legal grounds, which are overruled by the judge, and the judge charges that the plaintiff has a right to recover, without any exception being taken to the charge, the defendant can not afterwards object that a question of fact should have been submitted to the jury. *Hunter v. Osterhoudt*, 83
2. Where a cause is tried by the court, a jury being waived by the parties, the finding of the judge is conclusive as to all questions of fact, where there is *any evidence* upon the fact. *Gilbert v. Luce*, 91
3. Where interrogatories for the examination of a witness were not settled by an officer of the court under the statute, but were agreed upon by stipulation between the parties, and it was stipulated that the settlement of the interrogatories should be without prejudice to any valid objection to the competency of the witness; also to the admissibility in evidence of any entries in the books of the witness; also without prejudice to any valid objection on account of the immateriality of the first two cross-interrogatories; and with these reservations the interrogatories direct and cross were by such stipulation settled and were to be annexed to the commission; *Held* that by this stipulation the parties waived all objections to the form of the interrogatories; and that neither party could be allowed to make a mere formal objection, on the trial of the cause. *Morse v. Cloyes*, 100
4. The section of the revised statutes which reserves to the parties every objection to the competency or relevancy of any question put to, or answer given by, a witness examined upon commission, is not applicable to a case in which the parties have expressly stipulated and agreed upon the objections which are reserved, thus by implication waiving every other.

5. Where a witness stated that at the time a particular transaction occurred he kept a cash book, in which he regularly entered all his cash transactions, and that the same was then before him, and produced to the commissioner, and in which the amount of money received by him from one of the parties was entered by him, and gave an extract from the book, containing that entry, and one immediately preceding and another succeeding it; *Held* that it was competent for the witness to refresh his memory by referring to, and examining such entry; and that it was competent for the party to prove by him how and by what means he refreshed his memory, with a view of ascertaining the reliance to be placed upon it; but that the testimony was not evidence of the truth of the matter contained in the entry, or upon the question of fact in issue. *ib*
6. It is in the discretion of the judge who tries the cause, to permit or refuse the re-examination of a witness who has been examined and cross-examined, and permitted to leave the stand; and the court, at the general term, will not review the exercise of his discretion. *Meakim v. Anderson*, 215
7. And where the plaintiff wished to recall a witness, originally introduced by the defendant, that he might explain part of his testimony, on the ground that it had been misunderstood; and the judge stated that the witness had, both in his original and cross-examination, made the statement which he desired to explain, and that he did not think proper to permit such explanation when there was no doubt as to what the witness stated, and after a conference, by the witness, with the plaintiff's counsel, it was deemed a proper exercise of his discretion. *ib*
8. A general exception to the charge of the judge will be unavailing, where it is not perceived that any error of law is committed in the charge, and the whole dispute in the case is on a question of fact, and that is left to be determined by the jury. *ib*
9. Testimony to impeach a witness does not furnish ground for a new trial, when applied for upon an allegation of newly discovered evidence. *ib*
10. A new trial will not be granted to a plaintiff on the allegation that he was surprised on the trial, by the evidence of a witness for the defendant, when it appears that he was informed by the defendant, before the suit was brought, that his defense would be the fact stated by the witness, and that he was also at the same time informed by the witness what the fact was; and his testimony on the trial corresponded with his previous statement to the plaintiff. *ib*
11. It is no ground of error, that the judge, in his charge to the jury, stated, as law, what had nothing to do with the case. *Lyon v. Marshall*, 241
12. A judge is right in refusing to charge the jury in the manner, or to the purport requested by a party, where there is nothing in the case to call for such a charge. *ib*
13. If the charge of the judge contains, *substantially*, the propositions, which the counsel for one of the parties had requested the judge to present in his charge, it is a sufficient compliance with such request, and it is no ground of error, that they are not expressed in precisely the same terms. *Sherman v. Wakeman*, 254
14. If, from the answer given by the judge to an inquiry of the jury, a party is apprehensive that the jury may be led to an erroneous supposition, he should suggest that to the judge, and not except merely, in general terms, to an instruction which is correct in fact. *Stroud v. Fritz*, 800
15. Where the jury are correctly instructed on the questions of law, a doubt concerning the weight of evidence, is no sufficient reason for disturbing their verdict. *ib*
16. Whether a witness shall be recalled, or not, after the parties have closed their proofs, rests in the sound discretion of the court. *Dunkle v. Kocker*, 887
17. When there is no material defect in the proof, the court ought not to disturb the judgment of the court

below, for a difference of opinion on the weight of the evidence. *ib*

18. A general exception to the charge of a judge is of no avail, unless the entire charge is erroneous. *Van Kirk v. Wilds*, 520

See ARREST.
COMPUTATION OF TIME.
WITNESS, 3.

PRESUMPTION.

See PLEADING, 7, 8.
PUBLIC OFFICERS, 1.
TRUSTS AND TRUSTEES, 11.

PRINCIPAL AND AGENT.

1. In all instruments of a special character, the general terms which are used, must be construed in reference to the particular terms which form the subject matter of the instrument. *Taylor v. Harlow*, 282
2. But the court, in giving a construction, will apply the principle that all instruments must be construed according to the spirit as well as the letter. *ib*
3. In a power of attorney given by the plaintiff, (who was the owner of a lot of timbered land) to his agent, the powers particularly mentioned, were "to commence and prosecute any suit or suits, action or actions, which may arise out of, or proceed from any trespass or trespasses, waste or wastes, committed upon the real or personal property, belonging to me, in the town of M.," and to "exercise a sound discretion in the settlement of any trespass or trespasses so committed as aforesaid," &c. The agent settled with the defendants for trespasses committed by them on the lands of the plaintiff in the town of M., before the commencement of any suit against them, and gave them a writing, in the name of his principal, [the plaintiff,] stating the receipt by him, from them, of "sixty-two dollars, in full for timber, and for all trespasses committed by them, or either of them, or their servants or agents on the land of" the

plaintiff, "in the town of M." *Held*, That the agent was authorized to settle for trespasses, &c., as well before, as after, suit brought; and that, as a recovery, or settlement in trespass, would debar the plaintiff of authority to sue in replevin to recover the property taken, so a settlement of the trespass had the same effect, though made before a suit was brought. *ib*

4. An exchange of horses was made between the plaintiff's agent and the defendant, upon terms which, as the defendant knew, the plaintiff had himself refused to adopt, as the basis of an exchange. The plaintiff did not know of the bargain until after it was made; nor did he know the terms of it, and that it was contrary to his proposition, until after the death of the horse received in exchange had put it out of his power to return it. And he repudiated the bargain as soon as he knew what it was. *Held* that an action might be maintained by the plaintiff to recover the value of the horse delivered by his agent, to the defendant. *Robertson v. Ketchum*, 652
5. A transfer of property by an agent who exceeds his authority in a material point, passes no title to the thing delivered; which may therefore be reclaimed by the owner. *ib*
6. In the contract of sale or exchange by an agent, as in all other acts done by him, it is essentially requisite, in order to bind the principal, that the authority should be pursued; otherwise the contract is void. This must especially be the case when the purchaser knows that the agent is violating his instructions, and they agree to conceal from the principal the fact of such violation. *ib*

PRINCIPAL AND SURETY.

1. Where a creditor, with the knowledge and assent of a surety, gives further time of payment to the principal debtor, on receiving a new security from him, such assent will take the case out of the rule, and the reason of the rule, by which sureties are held to be discharged by a dealing with the principal. *La Farge v. Herter* 159

2. In this state equity recognizes and protects the relation and rights of a surety, after as well as before judgment. And the same rule extends to courts of law. *ib*
3. In an action against one as surety, the suretiship being established, whatever would discharge the surety in equity will discharge him in a court of law. *ib*
4. The recovery of a joint judgment against principal and surety does not merge the suretiship of the surety, and render him a principal debtor. *ib*
5. Where, after the recovery of a judgment against principal and surety and a levy upon the property of the principal, the creditor took a bond and mortgage from the principal, for the amount of the judgment and in absolute payment thereof, and acknowledged satisfaction of the execution, by an indorsement thereon, and afterwards brought an action upon the judgment; *Held* that in such action the suretiship might be proved by evidence *alimunde*; and that such fact being established by the evidence, the circumstances constituted a defense to the surety. *ib*
6. *Held also*, that in such action upon the judgment, the plaintiff could not be allowed to prove that the bond and mortgage thus taken by him in satisfaction of the judgment were usurious and therefore uncollectable. *ib*
7. *Held further*, that the case would be different had the plaintiff attempted to foreclose the mortgage and the mortgagor had set up the usury. That might give the plaintiff all the rights resulting from the invalidity of the bond and mortgage. But his remedy upon the judgment, even then, would only be revived against the mortgagor, and not against his co-defendant; whether the latter was a surety or not. *ib*

See DEPUTY SHERIFF.

PRIVATE PROPERTY.

See EMINENT DOMAIN.

PROMISSORY NOTES.

1. A promissory note, delivered to an insurance company for premiums in advance, given according to the provisions of the charter of the company, authorizing it to receive such notes, is an available security, and valid in the hands of the company. *Crooke v. Mali*, 205
2. And if such note be pledged by the company as security on an advance of money to its full amount, to the company, which advance it is unable to repay, the party to whom the note is so pledged may recover the amount thereof, in an action against the maker. *ib*
3. In an action upon a promissory note, a total failure of the consideration of the note, or that it was given without consideration, may be proved on the trial, under the plea of the general issue, without notice. *Meakim v. Anderson*, 215
4. The Croton Insurance Company was incorporated in April, 1843, commenced business in July, 1844, and continued until May 15, 1846, when it became insolvent. On the 20th of June, 1844, the plaintiff in error gave his note to the company for \$5000, payable in one year, as a premium note, given in advance, in conformity with the 12th section of the charter of the company, and upon which note, or the balance thereof over the amount he should pay to the company for premiums earned, he was to receive five per cent per annum. He effected insurance with the company, and the premiums on the amount of insurance so effected, having been paid by him, were deducted from the face of the note; but he opposed the recovery of the balance, on the ground that the note was void for want of consideration. *Held*, that the note was valid, and that the receiver of the company was entitled to recover the balance due thereon. *Cruikshank v. Brouwer*, 228
5. An instrument in writing made payable "to the estate of M. L. deceased," and not to any person or persons by name, is clearly not a promissory note, under the statute. Whatever it may be considered, it is not a

- promise to pay the testator, for he is described as deceased. It can only be recovered upon as a promise to pay some other person or persons. *Lyon v. Marshall*, 241
6. If it be regarded as a promise to pay the executors of the deceased, then there is no necessity for their suing in a representative capacity; and doing so, unnecessarily, they are, if defeated, liable to pay costs, without a special motion or order for that purpose; and the defendant may enter up judgment against them for the costs, as of course. *ib*
7. A person to whom a promissory note, payable to order, has been sold and delivered, previous to its becoming due, for a full and valuable consideration, may maintain an action thereon, in his own name, without alleging an indorsement of the note to him. *Billings v. Jane*, 620
8. Where an indorser resided in the town of Palatine, in which town there was a post office, at Palatine Bridge, but had a box for receiving letters at Canajoharie, where his principal place of business was, and where he received most of his letters, *it was held*, that a notice of protest addressed to him at Canajoharie, was good service, although his residence was nearer to the post office in Palatine Bridge, than to that in Canajoharie. *HAND, J. dissented. The Montgomery County Bank v. Marsh*, 646
9. It does not vary the case that the plaintiffs' cashier *knew* that the defendant resided in Palatine Bridge, since he also knew that the defendant's place of business was in Canajoharie; and that the note was dated at the latter place, as were his letters to the plaintiff concerning the note. *ib*

See GUARANTY, 4, 5, 6, 7.
INSURANCE, 1.

PUBLIC OFFICERS.

1. Some things may be presumed, in favor of a proper discharge of duty by a public officer. When he re-

turns that he has made personal service of process he is not required to state what in particular he did, to constitute such service. It will be presumed that he did all that the law requires. *Van Kirk v. Wilds*, 520

2. In such cases it must be made affirmatively to appear that the requirements of law have not been complied with, before advantage can be taken of a defect in the mode of service. *ib*
3. When an officer on being sued for taking property, by virtue of an attachment, alleges and seeks to prove that an alleged transfer of the property to the plaintiff by the defendants in the attachment suit was fraudulent as against creditors, he will be permitted—for the purpose of giving character to the transaction, and enabling the jury to determine as to the motives which actuated the parties—to prove other transactions in which the parties were engaged about the same time. *ib*
4. As between the parties to process, and their privies, the return of a ministerial officer, stating his official doings in the execution of that process, is, with some exceptions, conclusive evidence. *Russell v. Gray*, 541

R

RAILROADS.

1. An action for negligence can not be sustained, if the wrongful act of the plaintiff co-operated with the misconduct of the defendant to produce the damages sustained. And this is so, whether the plaintiff's act was negligent or willful. *Clark v. The Syracuse and Utica Railroad Company*, 112
2. It is an act of negligence to suffer cattle to be at large in a highway, at railroad crossings. Therefore, where the owner of a cow suffered her to be at large in the highway, and upon a railroad track, at the usual time for the passenger train of cars to pass, and the cow

was killed by the train of cars; *Held* that the owner could not recover the value of the cow, in an action against the railroad company. *ib*

3. Although a person has the right to use the highway, for the passage of his cows to and from the pasture, yet he must use ordinary and proper care and diligence in driving them; having reference to the situation of the road, and the manner in which it is used. *ib*

4. Where cows are trespassers upon a railroad, their owners can not maintain an action against the railroad company for running over and killing them by their passenger cars; even if the death of the cows was occasioned by the gross negligence of the defendants. *ib*

5. Accordingly, where it appeared that cows were pastured in a lot adjoining a railroad, between which and the railroad there was no fence, and there was no allegation in the pleadings to authorize evidence that they escaped on to the road through a defect of fences which the defendants were bound to repair, and no averment that the defendants were bound to fence at that point, or showing from what place, in what manner, or how the cattle came upon the road; *Held* that no action could be maintained against the railroad company for running over and killing the cows, by means of their engines and cars. *ib*

6. A railroad company may properly be sued in a justice's court by long summons. *Johnson v. The Cayuga and Susquehanna Railroad Co.* 621

7. Upon an agreement by a railroad company to carry freight for the owner thereof, at so much per ton, it is not liable to refund to the freighter the amount paid by him for weighing the freight; in the absence of any evidence of an agreement that the defendants were to weigh the same, or cause it to be done, or to pay for the weighing. *ib*

REAL ESTATE.

1. All the erections connected with a cotton factory, and other mills pro-

pelled by water-power, including the dams, water wheels, and gearing, and machinery fastened to the ground or buildings, are *prima facie* a part of the realty, and descend to the heir at law of the owner, upon his death, and do not pass to his executors or administrators as a part of his personal estate. *Buckley v. Buckley*, 43

2. They will also pass to the remainderman, as between him and the tenant for life. *ib*

3. Real property, purchased for partnership purposes, with partnership funds, and which remains after paying the debts of the firm, and adjusting the equitable claims of the different members of the firm, as between themselves, is considered and treated as real estate. *ib*

4. The rule in this state, as between grantor and grantee, vendor and vendee, mortgagor and mortgagee, and heir and personal representative of the deceased, is that whatever is annexed or affixed to the freehold, by being let into the soil or annexed to it, or to some erection upon it, to be habitually used there, particularly if for the purpose of enjoying the realty, or some profit therefrom, is a part of the freehold. *ib*

RECEIPT.

The consideration of a receipt is open to explanation. *Houston v. Shindler*, 36

RECORD.

The effect of a record of the appraisal of damages under the ninth section of the act of 1834, p. 440, in concluding the former owner from a right to recover the same, considered. *Adams v. Saratoga and Washington Railroad Company*, 414

RECOUPMENT.

See WAREHOUSEMAN.

REFEREE.

1. The report of a referee may be sustained, although he improperly ad-

mits some testimony, if, on rejecting that, enough remains to sustain his report. *Kemey v. Richards*, 812

2. One of three referees, before whom a cause is tried, can not be sworn and examined as a witness on the trial. *Morss v. Morss*, 510

See PARTNERSHIP, 4, 5.

REPLEVIN.

1. Where, upon the trial of a replevin suit, the defendants recover a judgment for the value of the property, and they subsequently collect the same, such judgment and satisfaction, by operation of law, will transfer the title to the property to the plaintiff; and in an action of trespass brought by him against the defendants, for taking and carrying away the property, the defendants will be estopped from disputing the plaintiff's title. *Russell v. Gray*, 541

2. Defendants in a replevin suit, after having recovered the property, or its value, on the ground that the sheriff has delivered it to the plaintiff, will not be allowed to defeat an action of trespass brought by the latter against them, for taking and carrying away the property, by impeaching the return upon which they have so recovered. *ib*

3. The 17th section of the replevin act, (2 R. S. 525,) was enacted for the benefit of the sheriff, and not of the party. The indemnity therein mentioned is for his security; and what shall be the extent and form of it, is for him, and no one else, to determine. *ib*

4. As soon as the inquisition is found by the jury, under that section, it becomes a question exclusively for the sheriff to decide, to which party he will deliver the property; or, if he delivers it to the plaintiff, what indemnity he will require. *ib*

S

SEISIN.

See TENANT BY THE CURTESY.

SET-OFF.

1. A motion to set off judgments obtained in a justice's court, transcripts of one or both of which have been filed with the county clerk, will not be entertained in this court; the county court having full power in such cases. *Ross v. Hicks*, 481
2. A motion to set off a judgment must be made in the court where the judgment against the moving party was obtained. *ib*

SHERIFF'S DEED.

See DEED, 2, 4, 5, 6, 7.

SHERIEF'S SALE.

Nothing will pass at a sheriff's sale but what is then known and promulgated. *Mason v. White*, 173

See EVIDENCE, 3, 4.

STEP-FATHER.

See PARENT AND CHILD.

STREETS.

1. The owner of a village lot bounded by a street is *prima facie* the owner, to the center of the street. *Adams v. Rivers*, 390
2. When the owner of real estate in a village lays out a street through the same, and divides the land on each side of it into village lots, which he sells to individuals in fee, commencing his boundary at a stake in the line of the highway, but not including the highway, by express terms, the respective grantees take to the center of the highway. *Adams v. Saratoga and Washington Railroad Company*, 414
3. A dedication of land to a public street, accepted and acted upon by the public since 1806, can not be revoked by the original owner of the road, or by a person claiming under him, so long as it remains in public use as a street. *ib*

4. The grantee of a lot bounded on a street *prima facie*, takes to the center of the street. To prevent the grant having this effect, there must be language *expressly excluding* the street. *ib*
5. Ejectment will not lie for a street, unless the occupation thereof by the defendants, is *wholly inconsistent with the public easement*. *ib*
6. To allow a street in a city to be used for a railroad track, either upon its natural surface or by tunneling, is not a misapplication of it; provided such use does not interfere with the free and unobstructed use of it by the public, as a highway, for passage and repassage. *ib*
7. In the city of New-York, the legal title to the soil of the streets, is vested in the corporation. In other parts of the state the legal presumption is, that the fee is in the owner of the adjoining lots. *Per WILLARD, P. J.* *ib*

See JUDGMENT, 5, 6, 7, 8.

SUBROGATION.

The right of subrogation, although originating in courts of equity, is now fully recognized as a legal right; and any act of the creditor which interferes with that right, and is a fraud upon it, operates to discharge the surety, as well at law as in equity. *La Farge v. Herter*, 159

SUMMONS.

See JUSTICE'S COURT, 1, 6, 7, 8.

SUPERINTENDENTS OF THE POOR.

See AGREEMENT, 5, 6.

SURROGATE.

1. Whether, upon the reversal of a decree of a surrogate, admitting an instrument to record and probate,

as a will, this court is limited in rendering judgment, to a reversal of the surrogate's decree, with an award of costs, or may go further, and adjudge that the instrument was not duly executed as a will, and is therefore null and void? *Quare. Mead v. Mead*, 661

2. Assuming that it has power to make such a disposition of the case as the surrogate ought to have made, it is not bound to do so, but may exercise a discretion on the subject. It is only when it is apparent that all the evidence, which exists in the case, has been produced, or there is some special reason for it, that the court should go beyond a judgment of reversal, with a direction as to costs. *ib*
3. When there is no conflict in the testimony before the surrogate, in reference to the execution of a will, the question whether it was duly executed is one of law. *ib*

See LIMITATIONS, STATUTE OF, 10, 11, 12.

T

TELEGRAPH COMPANIES.

1. The members of a private association—as a telegraph company—are not partners. They are tenants in common of the property and franchise belonging to the company, and the majority can not bind the minority, unless by special agreement. *Irvine v. Forbes*, 587
2. Where it was provided by one of the articles of association of a telegraph company, that as soon as an amount of stock should be subscribed for, equal to half the whole amount required, three trustees should be appointed, one by P., and two by subscribers of capital for constructing the line; HELD, that an election of trustees could not be legally made, without the concurrence of all the stockholders. In such case the stockholders must meet, or at least be notified of the time and place of the meeting at which trustees are to be chosen. *ib*

TENANT BY THE CURTESY.

1. The grantee or vendee of a tenant by the curtesy has all the rights of a tenant for life; and in respect to erections placed upon the premises by him for the purposes of trade, the question is substantially between a tenant for life and the remainderman. *Buckley v. Buckley*, 48
2. The seisin of one tenant in common is the seisin of the others. Accordingly, where a person, in right of his wife, became a partner with others in the ownership of a cotton factory and other mills, and in the management of the business thereof, and received a proportionate share of the profits from the time his wife became interested in the property, until after her death; *Held*, that this was a sufficient seisin of the wife to consummate the estate by the curtesy in the husband. *ib*

TIME.

See COMPUTATION OF TIME.

TRESPASS.

1. When an entry, authority or license, is given to any one by law, and he abuses it, he is a trespasser *ab initio*; but when the entry, authority or license is given by another, and the party abuses it, he may be punished for the abuse, but will not be a trespasser *ab initio*. *Adams v. Rivers*, 390
2. In order to make a man a trespasser *ab initio* when the law has given the entry, &c., the acts of abuse must be of such a character as to be the subject of a trespass, if there were no license. *ib*
3. An act of omission, or words of vituperation, merely, will not make a man a trespasser *ab initio*. *ib*
4. A person is a trespasser who, instead of passing along on the side walk of a street, stops on it, in front of a man's house, and remains there, using towards him abusive and insulting language. *ib*

5. All who aid, command, advise or countenance the commission of a tort by another, or who approve of it after it is done, are liable, if done for their benefit, in the same manner as if they had done the tort with their own hands. *Judson v. Cook*, 642

6. Thus where the president of a bank, at whose suit an attachment had been issued and levied on the property of the defendant therein, when applied to by the constable for directions in regard to selling the property, told him to do his duty; and directed the attorney of the bank to examine the question, and the facts, in relation to a prior lien upon the goods, and to act his judgment, whereupon the attorney instructed the constable to sell the goods; and the president of the bank attended the sale, and bid off a part of the property; *Held* that this was sufficient to connect the president with the taking or detaining of the goods, and that he was liable in an action therefor. *ib*

See CANALS.

TRUSTS AND TRUSTEES.

1. Although good faith must be strictly enforced against a trustee, and he may not be allowed to deal with the trust property to his own benefit, yet where the trustee had substituted a new security, by way of mortgage, in the place of a former mortgage, upon certain property, but not including the whole, which was covered by the former mortgage; and there was no gain intended to be made by the trustee; and so far as appeared, the new security would have been deemed sufficient at that time, and it was accepted by the *cestui que trust*, who was competent to judge of its value, the transaction was not deemed to be void. *Stuart v. Kissam*, 271
2. Whether a different rule would apply, if it had been shown that there was a fraudulent combination between the trustee and the other parties to the transaction to cancel the first mortgage for their benefit, it is not necessary to inquire, where

there is no *proof* of actual fraud; and it ought not to be gratuitously inferred. *ib*

8. A trustee of the separate estate of a married woman, having become seised, in his own right, of the greater part of the premises covered by a mortgage for \$20,000, belonging to his *cestui que trust*, acknowledged satisfaction of such mortgage, and caused it to be canceled of record; and soon afterwards, conveyed to his brother one-third of the mortgaged premises, and took back from him, his bond for \$20,000, with a mortgage upon the part of the premises so conveyed to him, payable at the time of payment of the original bond and mortgage which he had canceled. This new mortgage the trustee substituted in lieu of the canceled mortgage, and executed a declaration of trust, declaring that he held the same in trust for the separate use of his *cestui que trust*; but the property covered by the substituted mortgage, turned out to be an inadequate security for the \$20,000. On a bill filed by the *cestui que trust*, alledging that the original bond and mortgage had never been paid or satisfied, that the cancelment of that mortgage by her trustee, was without her knowledge or assent, and insisting that it was a breach of trust; a decree was made by a judge at a special term, establishing the original bond and mortgage as valid and existing securities, saving the rights of subsequent *bona fide* mortgagees; and directing a sale of the mortgaged premises, and the payment of the deficiency, if any, out of the estate of the obligor in the original bond. Upon an *appeal* from this decree, it was *held*, that the satisfaction of the *first mortgage*, which was produced in evidence, was *prima facie* proof of its discharge; and that the whole case of the complainant depended on her establishing that the second mortgage was not substituted with her assent; and that this she had failed satisfactorily to do; and that, in this view of the case, so much of the decree appealed from, as directed a sale of any but the forty-two lots, (which were the part of the original premises covered by the new or second mortgage, which was substituted for the first,) and an ac-

count of the estate of the trustee, and of the personal assets which came to the hands of any of the parties to this suit, as legatees and next of kin, and of the real estate which came to said parties as devisees—with the other parts of the decree connected with these inquiries should be *reversed*, with the costs of appeal. *ib*

4. Where a trustee deposits the funds of the trust estate in a bank, in his own name individually, and not as a trustee, and with his own private funds, he thereby becomes the debtor of the estate, and the creditor of the bank: and in case the trust funds are lost, through the insolvency of the bank, the loss will fall upon the trustee. *Matter of Stafford*, 353
5. It is a well settled principle of equity, that trust funds are to be kept separate from the private funds of the trustee; and if mingled with his own, he may be charged with such funds, as being himself the borrower. *ib*
6. The rule that a trustee, or person standing in a situation of trust and confidence, shall not purchase or deal with the subject of the trust, for his own benefit, is absolute and universal, and subject to no qualifications or exceptions. *Conger v. Ring*, 356
7. Where the committee of a lunatic purchases real estate and takes the conveyance to himself, in violation of his trust, and pays the consideration with money belonging to the lunatic, a trust results in favor of the lunatic; and this trust is retained by the 1 R. S. 728, § 53, and is turned into a legal estate by the 45th section of the same article; (1 R. S. 728, § 45;) and it is liable to be sold on execution; and descends to the heir at law, if not otherwise disposed of. *Reid v. Frick*, 399
8. A resulting trust may be proved by parol. *ib*
9. The plaintiff, a married woman, having some means of her own, with which she wished to purchase a home for herself and family, a house and lot were purchased by the de-

fendant and Q., who acted as her friends and advisers; the parol agreement being that Q. should take the deed as her trustee, and hold the property for her use and benefit. The purchase price was accordingly paid by the plaintiff, and Q. took an absolute and unconditional conveyance of the property to himself, containing no intimation of the uses to which the estate was to be devoted, or of the trusts under which the title was taken and was to be held. The plaintiff went into and had ever since remained in possession. The premises were subsequently sold under a judgment against Q., and the defendant became the purchaser, at the sheriff's sale, and he claimed to hold the same, for his own benefit, by virtue of such purchase, and of a judgment held by him against Q. *Held*, that in respect to the purchase at the sheriff's sale, the defendant was a purchaser with notice of the equitable estate of the plaintiff; and that in respect to his own judgment, he was a creditor seeking satisfaction out of property to which his debtor had no equitable title. And he was directed to release to the plaintiff his interest in the premises, and was enjoined from setting up any claim thereto, under the sheriff's sale, or either of the judgments. *Lounsbury v. Purdy*, 490

10. The power of trustees, over the subject matter of the trust, is equal and undivided. They can not, like executors, act separately; all must join, both in receipts and conveyances. *Ridgeley v. Johnson*, 527

11. A deed in the names of, and purporting to be executed by, three trustees of a trust in lands, appeared, upon its production, to have been in fact executed by only two of the trustees. The trustee who did not execute the deed had been appointed only a few months previous to the date of the deed. *Held* that inasmuch as the deed, upon its face assumed that he was still alive, and he was named as one of the grantors therein, the presumption was that he was alive at the date of the deed, and that a party claiming under the deed, in order to avail herself thereof, by showing authority in two trustees only to execute it, was bound to prove that such

third trustee was dead at the time the deed was executed by the others. *ib*

U

USE AND OCCUPATION.

A husband, after the death of his wife, may maintain an action to recover for use and occupation of the wife's real estate, by the permission of the plaintiff and his wife, during coverture. *Jones v. Patterson*, 572

USURY.

1. S. & W. were commission merchants at Albany, and the defendants resided at Oswego, and were dealers in wool, sheepskins, and pelts, and had been in the habit of consigning wool and skins to S. & W.; to be sold on their account. On the 18th of February, 1840, a contract was entered into between the parties, by which S. & W., on condition that they should have the selling of all the defendants' wool and skins, agreed to do it at a commission of five per cent; that they would advance or accept, on two-thirds of the value of property put into their hands; that they would then advance \$2000 in cash for 90 days, at five per cent commissions; that when drafts should fall due, if not put in funds, they should be at liberty to sell the property at the market price, to meet the same; or if they should advance the money to pay the same, they would charge five per cent on such advances. *Held* that this agreement was not *usurious per se*. That the transaction was not a *loan*, to be repaid in cash, like an ordinary loan; but was an advance made in the course of a legitimate commission business, where extra charges, on money advanced, are sanctioned by law. *Seymour v. Marvin*, 80

2. *Held also*, that if it was a fair and bona fide transaction in the commission business, usury could not be predicated of it; but if it was a disguised loan, under the cover and in the name of commissions, it was usurious. But that before the

court could pronounce the advances to be usurious, it must have some evidence showing that the commissions were exorbitant and unusual. *ib*

3. The court can not take judicial notice of what are the fair and usual commissions on acceptances paid without funds. *ib*

4. Where a party insists that commissions of that nature, charged against him, are so high as to amount to a disguised act of usury, the *onus probandi* is on him. *ib*

5. A usurious contract is executed and extinguished by *payment*. Consequently, after usurious loans and advances have been paid, they can not be recovered back; except that the excess may be sued for within a year, under the statute. *ib*

6. In an action brought to avoid a promissory note on the ground of usury, and to restrain a suit at law commenced thereon, the usurious contract must be substantially set forth in the complaint and must be proved as laid. *Morse v. Cloyes*, 100

7. Where a defendant in a suit at law has a defense of usury, which he can establish, by a competent witness, without a discovery from the alleged usurer, but is so situated that he can not avail himself of the testimony of that witness, in the suit at law, he may resort to a court of equity for relief, in order that he may examine such witness. He is not bound to rely upon the testimony of the alleged usurer, even though the latter has no legal interest in the event of the suit at law. *ib*

See APPLICATION OF PAYMENTS.

V

VENDOR AND PURCHASER.

1. Upon a sale of merchandise, on a credit of four months, upon notes to be made satisfactory to the sellers, a clerk of the vendors delivered the

merchandise, at the time agreed upon, to the cartman of the vendees, and another clerk shortly after the delivery called on the vendees with the bill of parcels, which contained the words, "at four months, for satisfactory security;" the vendees asked him what kind of notes would be satisfactory, and he replied, "just what the bill calls for." He again called upon the vendees, and they then said they had not fixed upon the paper that they would give; but they proposed the note of a third person for the vendors' consideration, who said they would inquire about him. But before the clerk had time to inquire again, the vendees had stopped payment, and no note was ever given. The sheriff having levied upon and taken the merchandise by virtue of an execution against the purchasers, the vendors brought an action of replevin against him for the taking. *Held*, that there was evidence enough to go to the jury, upon the question whether the sale and delivery of the property was conditional; and that the judge before whom the cause was tried *erred*, in ordering a nonsuit. *Draper v. Jones*, 263

2. The title of the vendors is not divested by the receipt of the goods by the vendees, where it is apparent that such was not the intention of the parties. *ib*

3. Where upon a conditional sale of property, the property is delivered to the purchaser without a compliance with the condition being insisted on, at the time, yet if it is insisted upon immediately afterwards, when a bill of sale is rendered, and the vendees fully recognize and acknowledge the condition as still subsisting and binding upon them, this is sufficient to uphold the condition. *ib*

See AGREEMENT, 3, 5, 6, 10, 11.

W

WAIVER.

See JUSTICE'S COURT, 5.
LANDLORD AND TENANT, 2.

WAREHOUSEMAN.

1. By the custom of warehousemen, known and established, they have the right to receive goods from a carrier, if in apparent good order, and advance to the latter his reasonable charges for the carriage of them, and to hold them subject to the lien of the carrier for the amount thus advanced; and if delivered to the owner without immediate payment, at the owner's request, a suit may be maintained to recover the amount advanced to the carrier. *Sage v. Giltner*, 120
2. And if the goods have been injured by the carrier, which injury is not apparent or known to the warehouseman, before or at the time of his receiving the goods, the owner must look to the carrier for his damages, and can not *recoupe* the same in an action by the warehouseman. *ib*

WASTE.

1. Where A. purchased of B. one of several parcels of land which were subject to a mortgage, and subsequently B. became insolvent, and made an assignment of his property, including a part of the land mortgaged, to trustees, in trust for the payment of his debts, the lands assigned being first chargeable with the payment of the mortgage, and being a slender security for the debt, interest and costs, and A.'s parcel being chargeable in case the land assigned should prove insufficient; *Held* that A. was, in legal effect, surety for the land assigned that when sold, upon the foreclosure of the mortgage, it should satisfy the mortgage; and that he had a right to see that the principal fund was not impaired by any waste committed thereon, by the assignees. *Johnson v. White*, 194
2. *Held also*, that A. was entitled to an injunction to prevent the commission of waste by cutting timber, &c. upon the land; but not to prevent the removal of timber already cut. *ib*
3. A case, the main and leading object of which is to obtain an in-

junction to restrain future waste, is one of purely equitable cognizance, and as incidental to this jurisdiction, the court, when waste has been committed, will, to prevent a multiplicity of suits, direct an account and satisfaction for past injuries. *Rodgers v. Rodgers*, 595

4. The plaintiff may show in his complaint the acts of waste begun, and those threatened, and in a proper case he may have an injunction to restrain the tenant from completing or continuing the waste, or from taking any steps to effect the waste threatened. *ib*
5. The court must be satisfied that the acts of waste will be committed if it does not interfere; and, for this purpose, the complaint may show that the party has actually commenced waste, or that he has threatened to commit it. *ib*
6. The injunction may be granted against any one who colludes with the tenant to commit waste. *ib*

WILL.

1. Where a testator directs that all his just debts and funeral expenses shall be paid by his executors, the charge is confined to property given to the executors. And if there is a devise of land to them, such land is chargeable with debts, unless otherwise specifically and entirely appropriated by the will. *Buckley v. Buckley*, 43
2. The formalities necessary to the due execution of a will depend wholly upon statutory regulations; and as the statute now in force does not require the attestation to be in the presence of the testator, it is no longer necessary that the subscribing witnesses should sign it in his presence. *Lyon v. Smith*, 124
8. Accordingly, where the attesting witnesses saw the testator sign the will, and were requested by him to sign it as witnesses, and they subscribed it, not in the immediate presence of the testator, but in an adjoining hall; *Held* a sufficient attestation. *ib*

6. Where the husband by his last will and testament appointed his wife executrix, and several other persons executors, only one of whom, with the wife, qualified, and the testator by his will gave to his wife all his real and personal estate during her life, and then added the following clause—"To carry the above into full effect, I empower the executors to make sale of the fast estate, and lodge the proceeds with the executrix, who is to enjoy the same during her life," it was held that the devise was not inconsistent with her claim for dower; that she was entitled to both the devise and her dower, and was not compelled to elect between such provision and her dower. *Lewis v. Smith*, 152

6. A will is to be interpreted by the intention as gathered from the whole of its provisions; and not by the meaning of words that would result from their derivation. *Hone v. Kent*, 815

7. A testator, by the sixth clause of his will, gave to his son, (who was also the sole executor,) his "Commentaries on American Law," four volumes, with the right of renewal of all previous and future editions, according to law, and all other rights and privileges appertaining to the copyright, and to so much of the then existing edition [the fifth] as might remain unsold at his (the testator's) death. But he thereby charged upon this bequest of the copyright, one moiety of the net proceeds arising after his death, from the sales of the work, to be held by his son, and his son's representatives, during the existence of the copyright, in trust, for the sole use and benefit of the testator's two daughters, E. H. (the plaintiff,) and M. S. and their respective lawful representatives; the one-fourth part of such net proceeds and profits to be paid to each. In the eighth clause of his will, the testator gave all the residue of his estate, real and personal, specifying as part of it, "*unsold Commentaries on hand*," (subject always to the life estate of his wife,) as follows, viz.: First, one equal undivided third part to his son, his heirs, &c. Second, one other equal undivided third part to his son, in trust for the sole and separate use

of E. H., during the joint lives of herself and her husband; and in case of her surviving her husband, then the principal and interest to be transferred to her; in case her husband should survive her, the principal, &c. thereof, remaining unpaid to her, to be transferred to her lawful issue, &c. Third, one other equal undivided third part, (being the remaining portion of his residuary estate,) to his son, in trust, for the sole and separate use of M. S. The testator died on the 12th of December, 1847. All the copies of the 5th edition of the Commentaries were sold previous to his death. In November, 1847, the printing of the 6th edition was commenced, and parts of the 1st, 2d and 4th volumes, (but no part of the 8d volume,) were printed before the testator's death. The printing was continued by the executor after the death of the testator, and the work was published and the copyright taken out by him in the spring of 1848. Held, that E. H., (the plaintiff,) did not take the one-fourth part of the net proceeds of the 6th edition, by virtue of the sixth clause of the will; but that those proceeds passed to the residuary legatees under the eighth clause of the will. *ib*

8. A testator, by his will executed previous to the revised statutes, devised the use of all his real estate to his wife, during widowhood. In 1831, after the revised statutes took effect, the testator became seised of other lands by purchase, and died in 1833, without having altered, or republished his will. Held, that the lands acquired in 1831 did not pass to the widow, under the will, but descended to the heirs at law of the testator. *Ellison v. Miller*, 332

See CHARGE.

WITNESS.

1. A bankrupt, after his discharge, is a competent witness for the plaintiffs in an action brought by his sureties to avoid a note given by them and the bankrupt, on the ground of usury. *Morse v. Cloyes*, 100

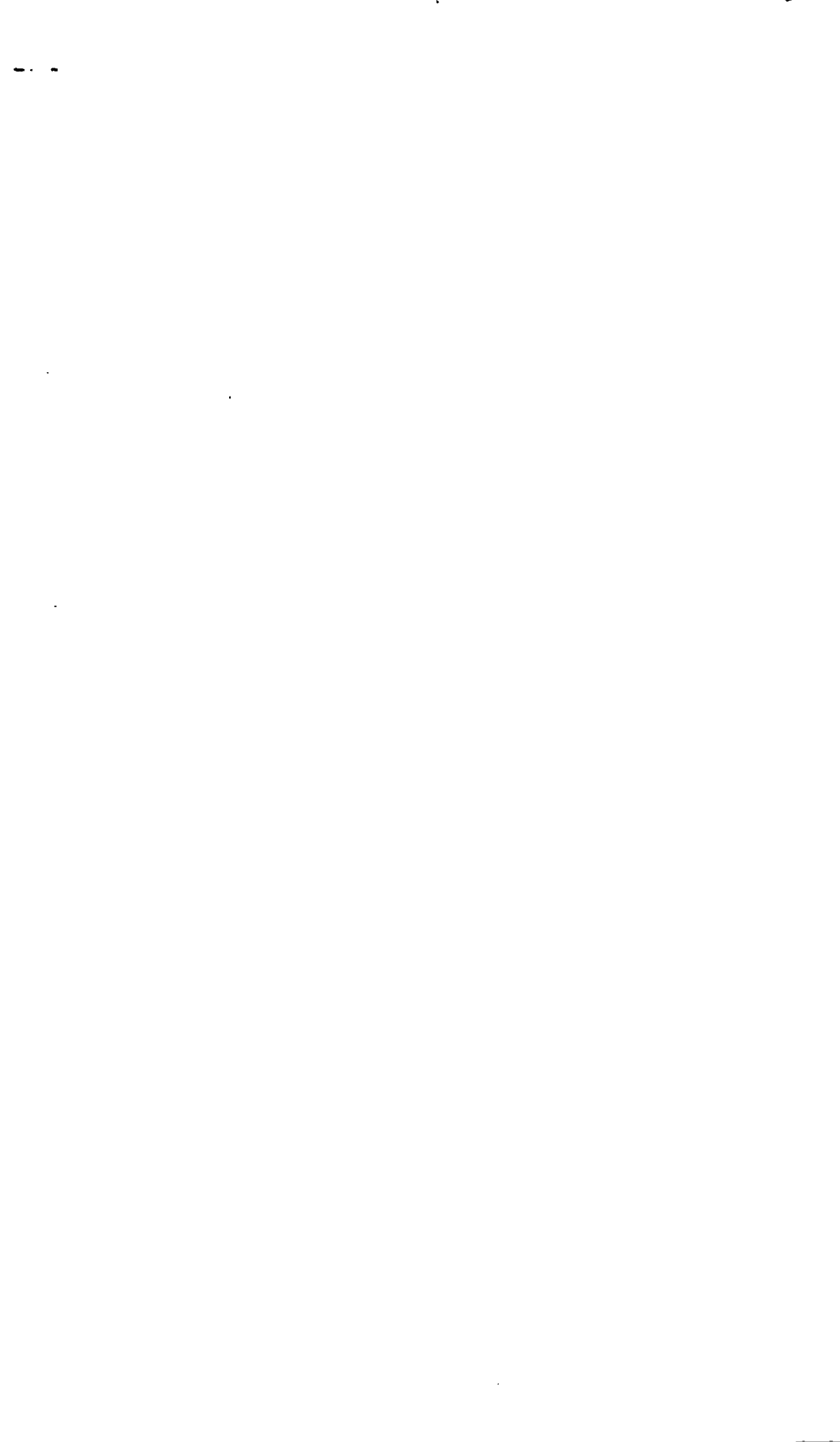
2. To exclude the bankrupt as a witness, in such a case, it must be shown that at least there may be a surplus of his estate, to which he will be entitled. A surplus and a consequent interest in the witness, will not be presumed. *ib*
3. Whether a witness shall be recalled, or not, after the parties have closed their proofs, rests in the sound discretion of the court. *Dunkle v. Kocker*, 887
4. The assignor of a demand, in an assignment of his property in trust for the benefit of his creditors, can not be a witness for the assignees, in a suit brought by them to collect the demand. *Fitch v. Bates*, 471
5. Under the code, if the result of a cause will directly and immediately affect any right or interest of a person proposed as a witness, and adversely if against the party calling him, he is inadmissible. As where the judgment, *per se*, must necessarily create or take away a right, or enlarge or diminish a fund in which he had a direct interest; or vest in him, or divest him of, an estate. *ib*
6. But if the record only furnishes evidence for or against him, and the effect of the recovery is not direct and immediate, then the objection goes to his credit. *ib*
7. One of three referees, before whom a cause is tried, can not be sworn and examined as a witness on the trial. *Morris v. Morris*, 510
8. Where, in an action upon a promissory note payable to M. N. or bearer, brought by a person to whom the same had been sold and delivered by M. N., the latter is examined as a witness in behalf of the plaintiff, the defendant is a competent witness to be sworn in his own behalf, and examined to the same matters testified to by M. N., the former owner of the note. *Bump v. Van Orsdale*, 684
9. A stockholder of a bank is a competent witness for the bank, under the code, § 398. *The Montgomery County Bank v. Marsh*, 645
10. A corporator is not a party for whose immediate benefit the suit is brought, under § 396 of the code. *ib*

See JUSTICE'S COURT.
PRACTICE.

END OF VOLUME ELEVEN.

H. Cox, R.T.O.

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HARVARD L